CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1929

W. W. CANDLER, ADMINISTRATOR OF C. H. PARKER, v. SOUTHERN RAILWAY COMPANY.

(Filed 11 September, 1929.)

1. **Master and Servant E a—Liability of railroad for injury to employee engaged in interstate commerce is governed by Federal Decisions.**

   The liability of a railroad company to its employees for injuries sustained by him while engaged in interstate commerce, in an action brought in the State courts, is governed by the Federal Employers' Liability Act and the Federal decisions thereunder.

2. **Master and Servant E b—Conflicting evidence of liability of railroad under the Federal Employers' Liability Act raises question for jury.**

   Where there is evidence tending to show that a conductor of the defendant railroad company, was struck and injured while crossing the defendant's tracks in the performance of his duties in interstate commerce by the negligence of an independent crew of another of defendant's trains in shunting a car a distance of two hundred yards without warning to persons or employees rightfully in the yard, in violation of rules of defendant, with conflicting evidence as to whether plaintiff's intestate knew of the customary violation of the rule, with further evidence of contributory negligence: *Held*, defendant's motion for judgment as of nonsuit was properly denied.

3. **Master and Servant C f, C g—The burden of proof of assumption of risk and contributory negligence is on defendant.**

   The burden of proof is on the defendant pleading them on the issues of contributory negligence and assumption of risk by the plaintiff's intestate in plaintiff's action to recover damages for a negligent killing.

4. **Master and Servant E b—Contributory negligence effects only diminution of damages under Federal Employers' Liability Act.**

Where the jury has found the issue of negligence in favor of the plaintiff and the issue of contributory negligence in favor of the defendant railroad company in an action in the State court for the negligent killing of the plaintiff's intestate while he was engaged in interstate commerce, under the Federal Employers' Liability Act, the plaintiff's right to recover is not barred, but the amount of damages are properly reduced under the rule of comparative negligence.

5. **Same—Railroad engaged in interstate commerce owes employees duty to use due care to furnish reasonably safe place to work.**

A railroad company engaged in interstate commerce owes to its employee the duty to use due care to furnish him a reasonably safe place in which to work.

6. **Same—Where on the issue of assumption of risk the evidence is conflicting the question is for the jury.**

Where there is evidence tending to show that the defendant railroad company had a rule for the safety of its employees, and there is conflicting evidence as to whether the plaintiff's intestate knew of the customary abrogation of the rule by defendant's employees, the question of assumption of risk is properly for the jury.

APPEAL by defendant from *Harwood, Special Judge,* at March Special Term, 1929, of BUNCOMBE. No error.

Action to recover damages resulting from the death of plaintiff's intestate, caused by the negligence of employees of defendant in the operation of one of its trains.

The defendant is a common carrier by railroad. Plaintiff's intestate was an employee of defendant. Both he and defendant were engaged in interstate commerce at the time he was injured and killed. At his death, plaintiff's intestate left surviving his widow and three children, each of whom was under the age of twenty-one.

This action was brought in the Superior Court of Buncombe County by the plaintiff as the personal representative of the deceased employee, for the benefit of his widow and children.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff's intestate, C. H. Parker, killed by the negligence of the defendant, Southern Railway Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate, C. H. Parker, assume the risk, as alleged by the defendant in its answer? Answer: No.

3. Did the plaintiff's intestate, C. H. Parker, by his own negligence contribute to his death as alleged in the answer? Answer: Yes.

4. What damages, if any, is plaintiff entitled to recover? Answer: $15,000."

From judgment on the foregoing verdict that plaintiff as administrator of C. H. Parker, recover of the defendant, Southern Railway Company, the sum of $15,000, and costs, defendant appealed to the Supreme Court.

Fortune & Fortune and Harkins & Van Winkle for plaintiff.
Thomas S. Rollins for defendant.

CONNOR, J. The liability of defendant to plaintiff in this action, if any, must be determined in accordance with the provisions of the Federal Employers' Liability Act, as the same have been construed and applied by the Federal Courts. The law of this State with respect to the liability of a common carrier by railroad to its employee for damages resulting from personal injuries sustained by him, or to his personal representative for damages resulting from his death, has been superseded by the act of Congress, when such act is applicable. Where there is conflict between such law, and the provisions of the act of Congress, the latter control, whether the action to recover damages by reason of such liability has been brought and is prosecuted in the State or in the Federal Courts. *Mondou v. New York, N. H. & H. R. Co.,* 223 U. S., 1, 56 L. Ed., 327, 38 L. R. A. (N. S.), 44. This principle is recognized by this Court, and has been uniformly applied in its decisions. *Potter v. R. R., ante,* 17, 147 S. E., 698; *Inge v. R. R.,* 192 N. C., 522, 135 S. E., 522; *Capps v. R. R.,* 183 N. C., 181, 111 S. E., 533. In *Lamb v. R. R.,* 179 N. C., 619, 103 S. E., 440, *Hoke, J.,* says: "This action is brought under the Federal Employers' Liability Act, and this being true, the question of substantive liability must be determined according to its provisions applicable, and authoritative Federal decisions construing the same."

The evidence offered by the plaintiff at the trial of this action tended to show that his intestate, C. H. Parker, while crossing a railroad track of defendant, in its passenger yard at Asheville, N. C., was knocked down by a moving car on said track, dragged a distance of about ninety feet, and thereby killed. He was employed by defendant as the conductor of a freight train, running from Asheville, N. C., to Knoxville, Tenn., and return. His train was standing on another track of defendant, in said passenger yard, awaiting orders for its movement on its regular schedule. As conductor of said train, he had received orders for its movement, delivered to him in the office of the dispatcher, and was walking across the tracks, which were located between the dispatcher's office and the track on which his train was standing, to give such orders to his engineer. He was performing his duties as an employee of defendant, at the time he was struck and killed by the moving car. He had no duty with respect to the movement of the car which struck and killed him, or with respect to the train, in which said car was to be included.

This car had been shunted or kicked into or upon the track over which plaintiff's intestate was required to cross, in the performance of his duties as a conductor. No engine was attached to the car; there was no brakeman or other employee of defendant on said car; no warning by signal or otherwise was given to plaintiff's intestate or to other employees of defendant at work in the passenger yard of the movement of said car. The car was shunted or kicked from the west yard of defendant, where cars were usually switched, and had moved a distance of about two hundred yards, at a rapid speed, when it struck and killed plaintiff's intestate.

There was evidence tending to show that the car which struck and killed plaintiff's intestate was shunted or kicked by the switching crew engaged in making up a train which was to include said car, in violation of rules of the defendant, and contrary to the custom followed by said switching crew in making up said train. There was also evidence tending to show that plaintiff's intestate, as he crossed the track on which the car was moving toward him, failed to keep a lookout for moving cars or trains. There was conflict in the evidence as to whether plaintiff's intestate knew that defendant's switching crew customarily violated the rules of the defendant, or frequently failed to follow the custom, if there was such custom, to give warning to employees of defendant when cars were shunted or kicked from the west yard into or upon the track in the passenger yard, over which plaintiff's intestate was crossing, at the time he was struck and killed. There was no evidence from which the jury could find that plaintiff's intestate saw the moving car as it approached him, or that he was warned of its approach. There was evidence tending to show that he was struck and knocked down and under the moving car, before he was aware of its approach. The car with no engine attached to it, and with no brakeman or other employee on it, proceeded a distance of about ninety feet before it was stopped. The lifeless body of plaintiff's intestate was then taken from under the car.

Upon this evidence, defendant's motion for judgment as of nonsuit was properly denied. There was evidence tending to show affirmatively negligence on the part of defendant's employees, in causing the car to be shunted or kicked a distance of two hundred yards from the west yard into the passenger yard, without warning to persons or employees rightfully in the passenger yard, and that this negligence was the proximate cause of the death of plaintiff's intestate. He had no duty by reason of his employment by defendant with respect to said car, or with respect to the train which was to include said car. He was at a place on defendant's premises where he was required to be in order to perform his duties as a conductor. While he was there, engaged in the performance of his duties, defendant owed him the duty to exercise due care to furnish and maintain for him a reasonably safe place in which to perform his duties. There was evidence tending to show a breach of this duty, which was properly submitted to the jury.

The jury has found that plaintiff's intestate by his own negligence contributed to his death, and under the provisions of the Federal Employers' Liability Act, the amount of plaintiff's recovery in this action has been reduced in accordance with this finding. The answer to the third issue is in accordance with the contentions of the defendant.

It cannot be held as a matter of law, as contended by defendant, that upon all the evidence plaintiff's intestate assumed the risk of injury arising from the negligence of defendant, as found by the jury. The conflicting evidence as to whether plaintiff's intestate, as an employee of defendant, knew of the custom of defendant's switching crew, if any such custom existed, to kick or shunt cars upon the track over which he was passing, without warning by signals or otherwise, or of the continued violations of the rules of defendant, with respect to the movement of cars on its tracks, which resulted in the abrogation of such rules, was properly submitted to the jury. Without such knowledge, it cannot be held that he assumed the risk arising from the negligence of defendant's switching crew. *Cobia v. R. R.,* 188 N. C., 487, 125 S. E., 18.

Upon its appeal to this Court, defendant relies upon the decision in *Toledo, St. L. & W. R. Co. v. Allen,* 276 U. S., 165, 72 L. Ed., 513, to sustain its contention that upon all the evidence plaintiff is not entitled to recover in this action. In that case, it was held that a car-checker working in a railroad yard, at night, assumes the risk of injury from the shunting of cars without warning along a track adjoining the one on which he was at work, where he is familiar with the conditions of the tracks and the method of doing the work. In the instant case the evidence with respect to knowledge on the part of plaintiff's intestate of the method of making up trains by the switching crew of defendant was conflicting, and was, therefore, properly submitted to the jury. The burden of the second issue was on defendant. Defendant offered no evidence, but relied upon its motion for judgment of nonsuit, at the close of plaintiff's evidence.

As we find no error in the denial of this motion, the judgment is affirmed.

No error.

W. J. SIMMONS v. CITY OF ELIZABETH CITY.

(Filed 11 September, 1929.)

Municipal Corporations D a—Board of aldermen can abolish office during term of incumbent when they have valid delegated power of creation.

An act authorizing a municipality to create in its discretion an office local thereto implies the power to abolish the office, the act being a valid delegation of legislative power in exception to the general rule, and one accepting the position cannot acquire a vested right therein by contract for a definite term of employment. *Mial v. Ellington*, 134 N. C., 131, overruling *Hoke v. Henderson*, 15 N. C., 1, cited and applied.

APPEAL by defendant from *Devin, J.*, at March Term, 1929, of PASQUOTANK. Reversed.

Aydlett & Simpson for plaintiff.
Thompson & Wilson and J. B. Leigh for defendant.

ADAMS, J. On the first Monday in June, 1927, the plaintiff was appointed by the board of aldermen as sanitary inspector of the defendant city for a term of two years at an annual salary of $1,440, payable in equal monthly installments. He qualified as provided by law and served in this capacity for more than a year; but at a meeting held on 10 August, 1928, the board passed an ordinance or made an order abolishing the office of sanitary inspector, and thereupon notified the plaintiff that his services would not be required after the first day of September. The order was made for the alleged reason that the installation of a water system for the city and the adoption of sanitary provisions recommended by the State Board of Health had curtailed the officer's duties to such extent that to continue the office would impose a pecuniary burden upon the taxpayers of the city which was neither necessary nor justifiable.

On 4 October, 1928, the plaintiff brought suit against the defendant before a justice of the peace and recovered a judgment for $120, the installment alleged to be due for the month of September, and afterwards in the Superior Court, upon a verdict duly returned, he was awarded judgment for the same amount. The defendant excepted and appealed upon error assigned, including the denial of its motion for nonsuit.

The plaintiff contends that the board of aldermen had no legal authority to abolish the office of sanitary inspector during the term for which he had been appointed, and the defendant insists that the action taken by the board is altogether defensible. These contentions present the point in controversy. The ordinance, it must be observed, did not undertake to remove the officer and continue the office, but to abolish the office itself.

The general rule is that the constitutional power conferred upon legislatures to make laws may not be delegated; but an exception to the rule is the authority granted by the Legislature to a municipal corporation to exercise the power of local legislation. This authority, in such event, is said to be the delegation of legislative power by the State. 1 McQuillin on Mun. Corp. (2 ed.), sec. 395; *S. v. Thomas,* 118 N. C., 1221; *Wharton v. Greensboro,* 146 N. C., 356.

Public offices are not property, but agencies and trusts; between the agent or officer and the government he represents there is no contract right, in the broad sense, of which he cannot be deprived. His contractual right to a salary may accrue during his incumbency, but not after the rightful abolition of the office. His appointment and his tenure of an office created for the public use, as stated by the Supreme Court of the United States in *Butler v. Pennsylvania,* 10 Howard, 402, do not come within the constitutional import of the term "contract" or of the vested, private, personal rights thereby intended to be protected. It is there pointed out that they are functions of powers and obligations by which governments foster and promote the general good—functions which the government cannot be presumed to have surrendered. *Newton v. Commissioners,* 100 U. S., 548, 25 Law Ed., 710. "Nothing is better settled than the legislative power to terminate at pleasure the incumbency of a statutory office, either by an abolition of the office itself or by a change in the tenure or the mode of appointment." *Kendall v. Canton,* 53 Miss., 526. This is true whether the exercise of legislative power be original or delegated.

In a further discussion of the question McQuillin says: "No law reducing the salary of an officer, imposing additional duties without increasing the compensation, or abolishing the office will be held unconstitutional as "impairing the obligation of contracts" or as depriving any person of property "without due process of law," notwithstanding the officer is elected or appointed for a definite term." Mun. Corp., sec. 514. There is authority for saying that a municipal office created by the Legislature cannot be abolished by an ordinance; but where a municipal corporation under a provision of its charter or special legislative act has the power to create an office it has also the power to abolish it, because the power to create implies the power to destroy. Dillon Mun. Corp., 4 ed., sec. 231; 5 ed., sec. 423; McQuillin, sec. 514; *Downey v. State,* 67 N. E. (Ind.), 450; *People v. Brooklyn,* 43 N. E. (N. Y.), 554, and numerous cases cited by McQuillin.

The principle is discussed under a copious citation of authorities in *Mial v. Ellington,* 134 N. C., 131. There the question was whether a supervisor of roads for a township who had been appointed for two years had a vested property interest or contract right in his office of which the Legislature could not deprive him. The Court holding that he had no such right or interest, overruled *Hoke v. Henderson,* 15 N. C., 1, so far as it affirmed the law to be that public office is private property, with all the results that logically flow from the proposition. We may safely rest our decision upon the broad doctrine promulgated in *Mial v. Ellington,* for it will be observed that other cases citing *Hoke v. Henderson* in support of the position that a public office is a contract which cannot be impaired were decided prior to the express repudiation of that doctrine. *Ward v. Elizabeth City,* 121 N. C., 1; *Wood v. Bellamy,* 120 N. C., 212. But in *Ward v. Elizabeth City,* approving *Hoke v. Henderson,* it was said that every one who accepts an office created by legislative enactment takes it with notice that his office may be abolished.

The act revising and consolidating the charter of the defendant city was ratified 31 January, 1923. Private Laws 1923, ch. 15. Section 44 required that the board of aldermen after its organization should proceed to the appointment of a health officer, a city attorney, and an officer to be known as the city manager, and as soon thereafter as possible, upon the recommendation of the city manager, should appoint a city auditor, a city tax collector, a street commissioner, a harbor master, a chief of police, a building inspector, and "all such other officers, deputies and assistants as it should deem necessary," who should hold their offices for the term of two years, subject to removal for sufficient cause.

Under the direction of the Legislature a health officer was appointed; but the creation of the office of sanitary inspector and the appointment to this office were left to the discretion of the aldermen. Upon the board was conferred the legislative power to create the office and to appoint the officer, and this involved the power to declare the office no longer existent, notwithstanding the designated tenure of two years. Doing away with the office necessarily forestalled the officer's right to demand a continuation of his salary. The motion for nonsuit should have been granted.

Judgment reversed.

D. B. WALSTON v. W. B. COPPERSMITH AND E. COPPERSMITH,
TRADING AS COPPERSMITH BROTHERS.

(Filed 11 September, 1929.)

1. **Accord and Satisfaction A a—Acceptance of check marked in full payment of disputed account discharges debt in absence of agreement to contrary.**

   The acceptance by the creditor of a check stating thereon to be in full for a disputed account is a satisfaction thereof when there is no ambiguity in the transaction and nothing to show that its acceptance was upon a different understanding or agreement.

2. **Evidence D b—Evidence that deceased made agreement that check was not to be in full payment held inadmissible as communication with decedent.**

   Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon balance on account was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by C. S., 1795.

3. **Same—Where door is thrown open by introduction of evidence of transaction with deceased, evidence of opposition is confined to that transaction.**

   In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by C. S., 1795, such evidence must relate to the particular subject-matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy.

CIVIL ACTION, tried before *Devin, J.*, at the December Term, 1928, of PASQUOTANK.

The evidence tended to show that in May, 1927, the plaintiff was an Irish potato grower, and the defendants were partners and Irish potato buyers; that the plaintiff made a contract with the defendants to deliver two hundred barrels of Irish potatoes on 14 June, 1927, at $4.75 per barrel. Thereafter, by agreement between the parties, the plaintiff agreed to deliver said potatoes on 7 June, and the price was increased to $5.25 per barrel. It was agreed between the parties that the potatoes furnished under the contract were to be "No. 1 U. S. grade Irish Cobbler Potatoes."

The plaintiff contended and offered evidence tending to show that potatoes of the specified grade were delivered to the defendants.

The defendants offered evidence tending to show that the potatoes delivered were not according to contract, and that the plaintiff was advised that the potatoes would not pass inspection, and thereupon it was agreed that the potatoes were to be sold for plaintiff's account. The defendants further contended and offered evidence tending to show that they had sold the potatoes for $8.50 per barrel, and that by reason of plaintiff's breach of contract they had suffered a loss of $650. The evidence further tended to show that subsequently the plaintiff agreed to sell to the defendants sixty-six barrels of potatoes at $6.50 per barrel.

On or about 25 June the plaintiff and one of the defendants, E. Coppersmith, met for the purpose of settling the account. The plaintiff contended that the potatoes were shipped according to contract, and the defendants contended that the potatoes were not in accordance with the grade specified, and that as a result thereof the defendants had suffered a loss. After some conversation between the plaintiff and E. Coppersmith the said Coppersmith delivered to the plaintiff a check for $628, containing the following notation thereon: "Balance on potatoes." The plaintiff cashed the check and used the money. At the time of the trial E. Coppersmith was dead. Plaintiff contended that, while he could read, he did not notice the notation on the check. The defendants contended that the receipt of the check by the plaintiff, under the circumstances, constituted a settlement in full.

An issue of indebtedness was submitted to the jury and answered in favor of the plaintiff in the sum of $640. From judgment upon the verdict the defendant appealed.

Aydlett & Simpson for plaintiff.
McMullan & LeRoy for defendants.

BROGDEN, J. Did the delivery of the check with the notation thereon "balance on potatoes," after a dispute had arisen between the parties, and the subsequent cashing of said check by the plaintiff, constitute an accord and satisfaction?

The principle of law involved in the transaction has been discussed in many cases. The leading authorities upon the subject are assembled in *Hardware Co. v. Farmers Federation,* 195 N. C., 702, 143 S. E., 471. It is not controverted that a dispute had arisen between the parties before the delivery of check. Obviously, if the check had been delivered under the circumstances with the notation thereon, nothing else appearing, the delivery, acceptance and cashing of said check would have undoubtedly constituted a settlement.

The legal principle was expressed in *Supply Co. v. Watt,* 181 N. C.. 432, 107 S. E., 451, as follows: "There was no ambiguity or grounds for misunderstanding defendant's tender and offer of settlement. Obviously he wanted to adjust all of their differences at one and the same time. The plaintiff had its choice, and we think it is precluded by its acceptance and election knowingly made. The check should have been returned if the conditions of its acceptance were not satisfactory, or at least, the defendant should have been given an opportunity to say whether he would waive the conditions and allow the check to be credited on account."

However, the plaintiff contends that something else does appear and that the acceptance of the check was explained by the conversation occurring between him and the defendant, E. Coppersmith, at the time the check was given and accepted. The defendant, E. Coppersmith, was dead at the time of the trial. The plaintiff testified that the defendant, W. B. Coppersmith, was not present at the time "we were discussing it," nor at the time when the check was given. The plaintiff was asked what statement was made by E. Coppersmith at the time the check was delivered. The defendant objected upon the ground that any statement made by E. Coppersmith was incompetent under C. S., 1795. The witness was permitted to give the following answer: "I told him I could not settle for that. You had not figured it right. I can't settle that way. He said he would get three disinterested potato men, and whatever they say I will give you every cent of it. I said that is as fair as we can do; that is the reason I received the check. The three disinterested men were selected at this time, and I walked over to the place where they were. The three disinterested men were not there with Elisha Coppersmith at the time I received the check."

The defendant contends that this evidence constituted a personal transaction within the purview of C. S., 1795, and was therefore incompetent. The position of the defendants is supported by the authorities, and the evidence should have been excluded.

Hence the result is that the check, with the notation thereon, without other explanation of the intention of the parties, was received and used by the plaintiff. Under these circumstances there was a settlement between the parties, and the motion for nonsuit should have been granted.

The plaintiff insists that the defendant, W. B. Coppersmith, had "opened the door" because he had testified about the purchase of the potatoes and with reference to other facts involved in the transaction. A careful examination of the record, however, does not disclose that the living defendant testified with reference to the giving of the check or the discussion between E. Coppersmith, deceased, and the plaintiff regarding the controverted items. The law is to the effect that if the "door is opened" with respect to one transaction or set of facts, it is not necessarily opened to all transactions or fact situations growing out of the controversy. In other words, if one party opens the door as to one transaction, the other party cannot endeavor to swing it wide in order to admit another independent transaction. This principle was definitely declared in *Pope v. Pope,* 176 N. C., 283, 96 S. E., 1034, in which the Court declared: "There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication."

New trial.

COMMISSIONERS OF CHOWAN COUNTY v. CITIZENS BANK, INC., ET AL.

(Filed 11 September, 1929.)

Principal and Surety B c—Admissions of administrator of principal are not admissible against surety when their interests are at variance.

A judgment upon the admissions in the answer of the administrator bank of a deceased county treasurer is not competent in an action by the county commissioners as evidence against the surety on the official bond of the deceased when the bank has been made a party defendant and the surety at once raises the issue as to whether a part of the defalcation was moneys defaulted from the bank when the deceased was acting as its assistant cashier, the interest of the bank and the surety being in conflict, and C. S., 358, not applying in such cases.

APPEAL by defendant, Maryland Casualty Company, from *Devin, J.*, at April Term, 1929, of CHOWAN.

Civil action by the commissioners of Chowan County to recover of the Citizens Bank, Inc., administrator of the estate of W. H. Ward, deceased treasurer of Chowan County, and the Maryland Casualty Company, surety on his official bonds, the sum of $17,733.56, alleged shortage in the official accounts of the said deceased treasurer.

The answer filed by the administrator admits liability for the full amount demanded, and upon this admission judgment on the pleadings was accordingly rendered against the administrator. This judgment, over objection, was then offered in evidence against the surety.

The Maryland Casualty Company contends that $10,260 of this amount is not properly chargeable against the official accounts of the deceased treasurer, but represents a claim of the Citizens Bank, Inc., against the estate of W. H. Ward, deceased, who was also assistant cashier of said bank at the time of his death, for moneys misappropriated by him as its assistant cashier and used to discharge, in part, his obligations to the county.

The Citizens Bank, Inc., on motion of the Maryland Casualty Company, was made a party defendant, and in its answer takes issue with the position of the surety.

A jury trial was waived, and all the parties agreed that the judge should find the facts and render judgment accordingly. No specific facts are found, but the judgment recites "and the court having found the facts and being of opinion and so finding, that the plaintiff is entitled to recover of the defendant, Maryland Casualty Company," the full amount of the alleged shortage, it is considered and adjudged, etc.

The Maryland Casualty Company appeals, assigning errors.

W. D. Pruden and McMullan & LeRoy for plaintiffs.
W. S. Privott and Aydlett & Simpson for defendant, Citizens Bank.
Manning & Manning for defendant, Maryland Casualty Company.

STACY, C. J. It appearing that the interests of the Citizens Bank, Inc., and the Maryland Casualty Company are in conflict with respect to the amount of the alleged shortage in the official accounts of the deceased county treasurer, we are of opinion that the judgment rendered on the admission of the Citizens Bank, Inc., as administrator, should have been excluded as evidence against the surety, notwithstanding C. S., 358, which provides that in actions on official bonds, any receipt or acknowledgment of the obligors shall be admissible and competent as presumptive evidence against any or all of the sureties. This statute has no application to self-serving receipts or acknowledgments made by a party under circumstances such as disclosed by the present record. The judgment was entered on the day of trial, over objection of the surety, and, in view of the relationship disclosed, we are of opinion that the objection should have been sustained. This was the only opportunity the surety had to challenge the correctness of the judgment, or to attack it in any way.

The administrator having a personal or corporate interest at variance with that of the surety will not be permitted to create evidence favorable to its personal or corporate interest, and practically foreclose the rights of the surety, by admitting liability when the facts are in dispute. It is true that in the instant case, the answer of the administrator was filed before the bank, in its corporate capacity, was brought in as a party defendant, but its corporate interest was apparent at the time of trial. There was nothing said in *Insurance Co. v. Bonding Co.,* 162 N. C., 385, 78 S. E., 430, which, when properly applied, militates against our present position. That case dealt with an unquestioned judgment against the principal, previously entered in another court and in a separate suit.

The cause will be remanded for a fuller finding or determination of the facts and for further adjudication of the rights of the parties.

Error and remanded.

MARY JANE WALKER AND L. N. WALKER v. APPOLLAS OWENS AND MARVIN ROBERTSON.

(Filed 11 September, 1929.)

Ejectment C b—Paper-writing which is not deed, will, lease, nor contract specifically enforceable is inadmissible as evidence in ejectment.

A paper-writing expressing that the deceased signer is to let O. have certain described property at the signer's death, O. to keep all buildings in good condition, and at the death of O. "this property goes back" to the signer's estate is inoperative as a deed, as it contains no apt word of conveyance and not being under seal, or as a will or as a lease or contract specifically enforceable, and will not be received in evidence in an action in ejectment.

APPEAL by defendants from *Cowper, Special Judge,* at April Term, 1929, of CURRITUCK.

Civil action in ejectment.

It is admitted that both parties claim title to the land in controversy under Jordan Poyner, deceased. The plaintiffs offered evidence of a fee-simple title in themselves and rested. The defendants then offered the following paper-writing, registered in Book 25, page 63, of the registry of Currituck County, as the only evidence of their right to hold the property during the life of A. A. Owens:

"Feb. 10th, 1922. This is to certify that I, Jordan Poyner, am to let A. A. Owens have the following property at my death. (Description not in dispute.) A. A. Owens is to keep all buildings in good condition. At his death this property goes back to Jordan Poyner's estate.
(Signed) Jordan Poyner."

Objection having been made, the instrument was excluded on the ground that it conveys no title to the land described therein. Exception by the defendants.

Verdict and judgment in favor of plaintiffs, from which the defendants appeal, assigning as error the exclusion of the paper-writing offered by them as evidence of their title.

Chester Morris and Ehringhaus & Hall for plaintiffs.
Thos. J. Markham for defendants.

STACY, C. J. The paper-writing in question was properly excluded as evidence. It is not a deed, for it contains no apt words of conveyance, and is not under seal. *Fisher v. Owens,* 132 N. C., 686, 44 S. E., 369.

It is not a will, nor was it offered as such for probate. Neither is it a lease or contract specifically enforceable. It conveys no interest to A. A. Owens who claims a life estate in the property under said instrument.

No error.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK v. E. W. LILES, AFFIE LILES AND CAROLINE R. LILES.

(Filed 11 September, 1929.)

1. **Principal and Agent A c—In this case held: the attorney securing loan was agent of borrower to pay off prior encumbrances.**

Where the lender of money makes a loan secured by a mortgage on the land containing a warranty that the title was free from encumbrances, and has no actual knowledge of a prior registered mortgage, and sends its check payable to the attorney securing the loan and the borrower, and the borrower endorses the check and gives it to the attorney and trusts him to pay off the prior mortgage lien, the attorney is the agent of the borrower for the purpose of paying the prior mortgagee, and the lender may recover from the borrower upon the default of the attorney to pay off the existing mortgage lien and his appropriation of the money to his own use.

2. **Same—In this case held: evidence of declarations of agent as to transaction was incompetent.**

Where one of two parties must suffer loss by the fraud or misconduct of another acting as agent in the transaction between the contracting parties, he who reposes the confidence in the agent, or by whose negligent conduct makes it possible for the loss to occur, without the knowledge or concurrence of the other, must bear the loss, and *Held*, under the facts of this case, evidence of the declarations of the agent in respect to the transaction was incompetent as evidence.

3. **Principal and Agent C d—Principal placing his agent in position to commit a wrongful act must suffer the loss occasioned thereby.**

Where the applicant to a land bank for a loan negotiates his loan through an attorney, and represents in his application that the land upon which the proposed loan was to be made was free from mortgage liens or encumbrances, and in his deed of trust on the land securing the loan warrants the title to be free and clear from encumbrances, and thereupon after the investigation of the title for the land bank by the attorney and his certificate to the land bank, the loan is made by check payable to the attorney and to the borrower, and the latter endorses the check and gives it to the attorney with the understanding that the attorney should cancel a prior registered mortgage with the proceeds: *Held*, the negligence of the borrower in not personally seeing to the cancellation of the prior lien makes him liable to that extent to the lender upon the failure of the attorney to have it canceled and his appropriation of the money to his own use, and a directed verdict upon evidence establishing these facts is proper.

APPEAL by defendants from *Midyette, J.*, and a jury, at June Term, 1929, of PASQUOTANK. No error.

Material facts: The plaintiff is a money-lender. It instituted this action to recover the sum of $4,500, and interest, loaned the defendants. The loan was made 1 January, 1926. The $4,500 indebtedness was payable in 66 semiannual payments, bearing six per cent interest, $157.50 each, payable on 1 January and July of each year. The note was secured by deed of trust of even date, which was duly recorded, on certain lands of the defendants.

The application for the loan signed by the defendant, E. W. Liles, recites: (a) "There are no outstanding deed or mortgages upon said premises unrecorded, and no liens or equities of any kind affecting the title thereto not fully disclosed of record, and I do not know of anything that may give rise to adverse claims of any kind." (b) "The undersigned represents, warrants, guarantees and insures to the said bank the truth of all and singular the foregoing statements, which are understood to form the basis for the proposed loan and are to be construed in connection therewith and as relating to the security offered therefor."

The deed in trust executed by all the defendants to a trustee for benefit of plaintiff recites: "That the same is free from all valid and subsisting liens and encumbrances; and that they will warrant and defend the title thereto against the claims of all persons whomsoever."

At the time the loan to defendants was made, the Federal Land Bank of Columbia, S. C., on 14 September, 1922, had loaned the defendants $4,000 on the lands on which plaintiff claims a lien. The deed in trust to secure same was duly recorded on 18 September, 1922. That the balance due on said loan is $3,720.17, with interest thereon at five and a half per cent from 1 December, 1928.

The defendants contend that C. F. Garrett, secretary-treasurer for plaintiff, wrote on 7 January, 1926, the defendant, E. W. Liles, the following letter:

"1. This is to notify you that, in pursuance of your application to this bank, and acting upon the recommendation of Federal Appraiser, C. L. Ball, we have approved the loan proposed to be made to you, to the amount of $4,500 in lieu of the $6,000 applied for, based on the acreage as set out in your application.

2. We, therefore, request that you now place in the hands of our attorney, E. A. Matthews, Roanoke Rapids, N. C., any papers or information in your possession which might be of assistance to him in preparing an abstract of your title to the land offered as security.

3. We especially request that you turn over to him for use in connection with, and to be attached to the abstract, a map or plat, prepared by some competent surveyor showing accurately the boundaries and

acreage of your land, and bearing the surveyor's signature in certification of these facts. This map should be procured at once by you, if you do not already have it.

4. We are sending a copy of this letter to the above mentioned attorney, to signify our request and desire that he proceed as speedily as possible with preparation of your abstract of title, in accordance with arrangements previously made with him by this bank; also that he send us, as soon as possible, legal description, for our use here in preparing trust deed.

5. Before paying you the proceeds of this proposed loan, we shall require a policy of insurance to be taken out on your buildings, providing for payment, by the New York Standard form of mortgage clause, of any loss to the Southern Trust Company, Elizabeth City, N. C., as trustee. We think the amount of this insurance should be $1,500."

The abstract of title by "E. A. Matthews, attorney," on 16 January, 1926, recited, among other things: "No encumbrances of record against the property of E. W. Liles described in caption of this abstract."

The final certificate made by "E. A. Matthews, attorney," on 4 March, 1926, recites, among other things, that there were no liens or encumbrances on the property that plaintiff took a deed in trust on and the lien was duly recorded "and is now a first lien on said property." The defendants further deny that they owe said debt and contend that E. A. Matthews, of Roanoke Rapids, N. C., was an agent and attorney of the plaintiff and procured the aforesaid loan for the defendants from the plaintiff. That the defendant, E. W. Liles, went to E. A. Matthews to get him to have released from the lien of a deed of trust held by the Federal Land Bank of Columbia, S. C., certain timber subject to the lien of said bank. He did not get the land released from the lien of said bank, and then made application to the plaintiff for the loan sued upon on an application blank which E. A. Matthews had in his office. Matthews fixed up the application in his office, at Roanoke Rapids. After having signed the application, he subsequently received the letter above set forth.

The defendant, E. W. Liles, testified in part: "I signed this paper (application for loan) in Roanoke Rapids; Matthews made it out. It is my signature at the bottom. I executed it in his office. After that time I executed a note payable to the Virginia-Carolina Joint Stock Land Bank, and the deed of trust also. The check was for $4,513.25, and was read by the witness to the jury as follows: 'Virginia-Carolina Joint Stock Land Bank, Elizabeth City, N. C., 26 February, 1926, pay to the order of E. A. Matthews, attorney, and E. W. Liles, borrower, $4,513.25, loan No. 2823, First and Citizens National Bank, Elizabeth City, N. C.'

I endorsed that check and gave it to Mr. Matthews; however, Matthews gave it to me and I endorsed it. I did not see him endorse it. I think he did. I do not think he had endorsed it at the time he gave it to me. I left a space at the top because his name appeared first in the face of the check. I don't think Matthews' name was endorsed before mine. Matthews turned over to me $540.00 some odd dollars in cash. I think he deducted $75.00 as his fee out of this check; that was satisfactory to me at the time. I could not say whether he had agreed on any fee before. I don't remember discussing it with him. My loan with the Federal Land Bank was in 1922 and 1923. I went to Roanoke Rapids to see Matthews to get him to write the Federal Land Bank and get them to release the timber. When I first got the loan I went to see Matthews about it. He prepared an abstract and I paid him his fee, but don't remember the amount."

E. A. Matthews, attorney, never paid the prior lien of the Federal Land Bank of Columbia, S. C., and has absconded. Defendants did not discover it was not paid until November, 1927, after Matthews had gone.

The court below charged the jury that if they believed the evidence and found the facts to be as testified to by all the witnesses, their answer to the issue would be that the defendants were indebted to the plaintiff and gave the amount and interest, to which there is no dispute. The jury found the issue in favor of the plaintiff. To this charge the defendants excepted and assigned error.

The defendants also duly excepted and assigned error to the following evidence, excluded by the court below: "That Matthews upon the arrival of the check represented by the loan in controversy informed the defendant that it would be necessary, as a part of the requirements of the plaintiff to withhold sufficient of the funds, amounting to approximately $3,700 to pay off the Federal Land Bank mortgage."

Worth & Horner and Thompson & Wilson for plaintiff.
George C. Green and Parker & Allsbrook for defendants.

CLARKSON, J. The question involved, as contended by defendants: "Is there sufficient evidence to show that Matthews was acting as agent of the plaintiff in the receipt and disbursement of the proceeds of the loan made to Liles?" We think not, under the facts and circumstances of this case.

From the evidence, plaintiff bank knew nothing about the prior lien on the land given by defendants to the Federal Land Bank of Columbia. The defendants (through E. W. Liles) in their application to plaintiff bank for the loan, stated that there were no liens on the land. He represented, warranted and guaranteed the truth of the statement that there were no liens on the land. In the deed of trust defendants gave to plaintiff, the warranty was to the effect that there were no liens and encumbrances on the land. Plaintiff, with no knowledge of the Federal Land Bank lien on the property, sent a check, on 26 February, 1926, payable to the order of E. A. Matthews, attorney, and E. W. Liles, borrower, for the loan, $4,513.25. E. W. Liles endorsed this check and turned it over to Matthews, who kept a fee of $75.00 out of it, to which Liles made no objection, and Matthews turned over to him $540 in cash, the balance Matthews kept to be applied on the lien of the Federal Land Bank of Columbia, S. C. Matthews never paid the Federal Land Bank of Columbia, and has absconded. On whom must the loss fall? Under the facts and circumstances of this case, we think on the defendants.

The defendants are *sui juris,* and it is a great hardship on them, but we cannot break into well-settled principles of law in hard cases. If we did, we would have no orderly system, and law would be a "rope of sand." The check was payable to the order of E. W. Liles, borrower, as well as E. A. Matthews, attorney. True, it was sent to Matthews, but he could not collect the money until Liles endorsed the check. Liles knew that he and the other defendants had given a lien on the land; the plaintiff knew nothing of the lien. Liles had even represented, warranted and guaranteed to plaintiff that there were no liens on the land. It was Liles' duty to have seen that the money sent by check to his and Matthews' order, was applied on the lien, but instead of doing this he endorsed the check and gave it to Matthews, and by so doing turned the money over and trusted Matthews, as his agent, to pay the lien, which plaintiff had not done by a check payable alone to Matthews. Liles trusted Matthews and made him his agent to perform an act that plaintiff knew nothing about, and Liles knew all about. We think the well-settled principle of law applies, as stated in the following cases: In *Lickbarrow v. Mason,* 2 T. R., 63, at p. 70, *Ashhurst, J.,* says: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." It is well said by *Lord (C. J.) Holt* in *Hern v. Nichols,* 1 Salk., 289: "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." In *County of Macon v. Shores,* 97 U. S., 272, 279: "Where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong, rather than by a stranger." In *O'Connor v. Clark,* 170 Pa., 318, 321, 29 L. R. A., 607, "Where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud." In *Bartlett v. First National Bank,* 247 Ill., 490, 498, "Where one of two innocent parties must suffer loss by reason of the wrongful acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss." See note in Mechem on Agency (2 ed.), Vol. 1, page 531. In *R. R. v. Kitchen,* 91 N. C., at p. 44, the principle is thus stated by *Ashe, J.,* and has been time and time again reiterated in this jurisdiction: "Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *S. ex rel. Barnes v. Lewis,* 73 N. C., 138; *Vass v. Riddick,* 89 N. C., 6; *R. R. v. Barnes,* 104 N. C., 25; *Ellison v. Sexton,* 105 N. C., 356; *Medlin v. Buford,* 115 N. C., 260; *Havens v. Bank of Tarboro,* 132 N. C., 214; *Bank v. Oil Co.,* 150 N. C., 718; *Campbell v. Huffines,* 151 N. C., 262; *Wynn v. Grant,* 166 N. C., 39; *Stelges v. Simmons,* 170 N. C., 44; *Bank v. Dew,* 175 N. C., 79; *Mann v. Mann,* 176 N. C., at p. 363; *Fain Grocery Co. v. Early & Daniels Co.,* 181 N. C., 459. See *Atlantic Life Insurance Co. v. Rowland* (C. C. A., 4th Circuit), 22 Fed. (2d), 126 (1927); *Kirkpatrick and Howard v. Warden,* 118 Va., 382, 87 S. E., 561 (1916).

An interesting discussion of this subject, which is termed "The dilemma of choosing between two innocent persons," may be found in Mechem on Agency (2d ed.), Vol. 1, p. 532 *et seq.,* and Vol. 2, p. 1552.

We do not think it necessary to discuss the two classes of agents general or particular or special and analyze the evidence. We think the principle stated above applies. Defendant Liles was negligent, and there was a lack of due care on his part, in trusting Matthews, the attorney, and defendants must bear the loss. Plaintiff took no chance and made the check payable to the order of both.

The letter saying "our attorney" does not affect the case. Defendants had the opportunity of protecting themselves, and failed to do so, by the check being made payable to the order of both.

From the position here taken, the evidence of the declaration of Matthews was incompetent.

No error.

GREENE COUNTY ET AL. v. SNOW HILL RAILWAY COMPANY ET AL.

(Filed 11 September, 1929.)

1. **Taxation A a—Township bonds to aid in construction of railroad are not for necessary expense and issuance must be submitted to voters.**

Township bonds issued for aiding the construction and operation of a railroad therein are not for a necessary expense, and require the approval of the voters of the township under a valid statute authorizing the issuance of the bonds.

2. **Statutes A c—In this case held: curative statute and ratification of acts under prior defective statute valid and constitutional.**

A retrospective act to cure an irregular or defective statute and to ratify proceedings thereunder, which the Legislature originally had the authority to enact, and which does not impair the obligations of a contract or affect vested rights is valid and constitutional.

3. **Taxation A f—In this case held: act not specifying amount of bond issue cured by later statute prescribing amount.**

Where a statute authorizing a township to issue bonds to aid in the construction of a railroad therein omits to specify the amount of the issuance, and the commissioners have called an election upon a petition therefor to vote thereon in an amount not to exceed $100,000, and this election is carried and the bonds are issued in that sum and held in escrow, and later a curative statute is enacted likewise fixing the amount of the issue in that sum: *Held*, the bonds are not invalid by reason of the omission in the original act.

4. **Same—Denomination of bonds held a detail concluded by signature of chairman and clerk of county commissioners under facts of this case.**

Where an act authorizing the issuance of township bonds provide that they shall be in the sum of $100 each, and a curative act is passed providing that the signature of the chairman and the clerk of the board of county commissioners "shall be conclusive of said form and details" the denomination of the bonds, nothing else appearing, is to be regarded as a detail, and validity of the bonds is not affected by the fact that they were issued in larger denominations.

5. **Taxation A c—Uniform rule of taxation applies to levy of taxes and not to expenditure of revenue derived therefrom.**

Township bonds to aid in the construction of a railroad, issued in accordance with a valid statute, are not objectionable on the grounds that taxes levied against such railroad are to be expended in paying the interest coupons of the bonds and in maintaining the sinking fund provided for in the act, the provision of the Constitution requiring uniformity in the levy of taxation not applying to the distribution of the revenue derived therefrom.

CIVIL ACTION, before *Grady, J.*, at Chambers. From GREENE.

On 27 February, 1917, the General Assembly of North Carolina enacted chapter 403, Public-Local Laws of North Carolina. In substance the act provided that the board of commissioners of Greene County, upon petition of one-fifth of the voters of any township or townships, were authorized to call an election in such township for the purpose of submitting to the qualified voters thereof the question of subscribing a specific sum for the purpose of constructing a standard gauge railway "either from the town of Hookerton or the town of Maury, Greene County, North Carolina, to the town of Snow Hill." Pursuant to said statute a petition was filed with the board of commissioners of Greene County requesting the said board to call an election "for the purpose of voting bonds to secure a railroad from Hookerton, North Carolina, to Snow Hill, North Carolina," the amount of the bonds issued not to exceed $100,000. Thereupon, on 3 November, 1919, the board of commissioners found that said petition was signed by one hundred and sixteen voters of Snow Hill Township, and that said number was more than one-fifth of the voters of said township. Consequently it was "ordered that an election be held on Friday, 12 December, 1919, according to law and the provision of said act, in said Snow Hill Township, at the usual voting place at Snow Hill, upon the said proposition to subscribe a sum not exceeding $100,000 for said first mortgage bonds." Thereafter an election was duly held in Snow Hill Township on Friday, 12 December, 1919. The canvassing board reported that there were two hundred and fifteen registered voters, and further, that there were cast "For subscription" one hundred and seventy-three votes, and "Against subscription," three votes. On 4 February, 1924, the board of commissioners duly passed a resolution declaring that "the one hundred thousand of Snow Hill Township bonds, voted 12 December, 1919, are fully authorized, and the said election was duly and properly held, and the said bonds shall now be prepared and issued in accordance with the law." The resolution of the board recites that the Snow Hill Railway Company had offered to build said railway, and thereupon it was resolved "that the proposition submitted by the Snow Hill Railway Company for the said bonds at par and interest, is hereby accepted, and same ordered to be duly filed." Thereafter, on 3 November, 1924, the commissioners duly passed a resolution that "$100,000 Snow Hill Township public improvement bonds shall now be executed with the written signature of the chairman of this board and attested by the clerk with the county seal impressed on it, dated 1 September, 1924; . . . that said bonds shall be deposited in the Snow Hill Banking and Trust Company, . . . and held by said bank in escrow, . . . and shall be finally delivered to the order of said purchaser when the said railway has been completed and placed in operation, and the resolution determining such fact shall have been passed by the board." In pursuance of the resolution bonds were executed and placed in escrow with the Snow

Hill Banking and Trust Company. Subsequently the National Bank of Snow Hill was duly appointed receiver of the Snow Hill Banking and Trust Company, which said receiver now holds said bonds.

On 12 March, 1928, the commissioners of Greene County and a number of taxpayers of Snow Hill Township instituted an action against the Snow Hill Railway Company, the National Bank of Snow Hill, receiver, and others, seeking to enjoin the said receiver from delivering said bonds or any proceeds thereof.

After hearing the cause the trial judge entered judgment "that the defendant, National Bank of Snow Hill, receiver of Snow Hill Banking and Trust Company, is perpetually enjoined and restrained from delivering to the Snow Hill Railway Company, . . . or to any other person the bonds described in the complaint." It was further adjudged "that said bonds be delivered up by the said defendant, National Bank of Snow Hill, receiver of the Snow Hill Banking and Trust Company, to the clerk of the Superior Court of Greene County and by said clerk be marked canceled under the terms of this judgment."

From the foregoing judgment both parties appealed.

The plaintiffs appealed for the reason that the judgment rendered "failed to expressly declare that any attempted issuing of any bonds heretofore upon the face of the whole record . . . was unauthorized and a nullity."

L. V. Morrill and Cowper, Whitaker & Allen for plaintiffs.

Fuller, Reade & Fuller, John Hill Paylor and J. Paul Frizzelle for defendants.

BROGDEN, J. Three questions of law are presented by the record:

1. Did the commissioners of Greene County have the power to issue the bonds in controversy?

2. Was the power properly exercised?

3. Are the bonds valid?

As the bonds were not issued for a necessary expense of a township, the power of the commissioners to issue them depended upon valid legislative authority and a vote of the people as contemplated by law. *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25; *Herring v. Dixon,* 122 N. C., 420, 29 S. E., 368; *Tate v. Commissioners,* 122 N. C., 812, 30 S. E., 352.

An election was duly held on 12 December, 1919. No attack is made upon the regularity of this election. However, an attack is made upon the special legislative authority, empowering the commissioners to call the election and issue the bonds. The legislative authority is contained in chapter 403 of Public-Local Laws of 1917, ratified 27 February, 1917, and in chapter 89 of Public-Local Laws, Extra Session, 1924, ratified 21 August, 1924.

The act of 1917 is assailed upon four distinct grounds:

(a) That the bonds contemplated were the bonds of Greene County and not those of Snow Hill Township.

(b) That no specific sum was mentioned therein.

(c) That the bonds were to be delivered to the Railway Company when the railroad shall have been completed and put in operation, and in addition, when the railroad delivered to the board of commissioners its bonds secured by first mortgage upon its property. The plaintiffs contend that the railroad, when completed, would engage in interstate commerce and, as it had no authority so to do, no valid delivery of the bonds could be made.

(d) That the act is unconstitutional by reason of the provisions of section 4 thereof to the effect "that all taxes levied upon the said railroad properties, when the said extension shall have been completed, shall be paid to the treasurer of Greene County and by him expended in paying the interest coupons and sinking fund hereinbefore provided for."

Chapter 89 of Public-Local Laws, Extra Session, 1924, is a curative act and ostensibly designed to supplement the act of 1917, and purports to validate the bonds. The act of August, 1924, provides that the bonds "shall be issued in the name of Snow Hill Township by the board of county commissioners of Greene County as agents of Snow Hill Township, in the amount of $100,000, . . . to be known as the Snow Hill Township public improvement bonds, and to be in such further form and details as may be provided by the chairman and clerk of said board of county commissioners whose signatures thereto shall be conclusive determination of said form and detail."

The plaintiffs also attacked the curative act of 1924. It is perhaps pertinent to observe in the outset that the petition for the election, signed by one-fifth of the qualified voters of Snow Hill Township, expressly provided that the amount of the bonds to be issued was not to exceed $100,000. The resolution of the county commissioners calling the election also stipulated that the election was to be held in order to determine whether or not Snow Hill Township would subscribe "a sum not exceeding $100,000." It would appear that the expression "not exceeding $100,000" would be sufficiently specific. But, however that may be, the curative act expressly specifies $100,000 in bonds. The objection to the act of 1917 upon the ground that the bonds are issued by Greene County is also removed by the curative act of 1924, which provides that in issuing the bonds Greene County should act as agent for Snow Hill Township. Therefore, if the curative act is valid, the principles announced in *Commissioners v. State Treasurer,* 174 N. C., 141, 93 S. E., 482, and in *Commissioners v. Boring,* 175 N. C., 105, 95 S. E., 43, would have no application.

The general rule with respect to curative acts of the kind involved in this controversy is thus stated in *Belo v. Commissioners,* 76 N. C., 489: "The competency of the Legislature to enact retrospective statutes, to validate an irregular or defective execution of power by a county corporation, is well settled. In *St. Joseph Township v. Rogers,* 16 Wall., 644, the election at which the subscription was approved was held before the law authorizing the subscription, and the court there decided that this and all defective subscriptions of the kind may be ratified, where the Legislature could have originally conferred the power, and that such laws when they do not impair any contract or injuriously affect the rights of third persons are never objectionable. The ratification operates as a previous authority." The principle thus announced has been cited with approval in many decisions of this Court. *Leak v. Gay,* 107 N. C., 468, 12 S. E., 251; *Edwards v. Commissioners,* 183 N. C., 58, 110 S. E., 600; *Jones v. Board of Education,* 185 N. C., 303, 117 S. E., 37; *Holton v. Mocksville* 189 N. C., 144, 126 S. E., 326. Manifestly, the Legislature had the power originally to fix a specific amount of said bonds and to empower Greene County to act as agent for Snow Hill Township. No principle of law is called to the attention of the Court tending to establish the invalidity of the curative act. Therefore, the first two grounds of objection to the act of 1917 are removed by the curative act of August, 1924.

The third ground of attack upon the act of 1917 refers to the delivery of the bonds rather than to their validity.

The fourth ground of attack is based upon section 4 of the act of 1917, which provides "that all taxes levied upon said railroad properties . . . . shall be . . . . expended in paying the interest coupons and the sinking fund hereinbefore provided for." This ground of attack cannot be sustained. The point has been expressly decided in *Brown v. Commissioners,* 100 N. C., 92, 5 S. E., 178; *Tate v. Commissioners,* 122 N. C., 812, 30 S. E., 352; *Newell v. Green,* 169 N. C., 462, 86 S. E., 291. In the latter case the Court declares: "Even if this were a property tax and not a privilege tax or an exercise of the police power, the provision of the Constitution requiring uniformity applies to the levy of taxes and not to the distribution of the revenue derived therefrom."

The application of the principles of law pertinent to this controversy leads to the conclusion that the commissioners of Greene County had the power to issue the bonds, and that such power has been properly exercised. Therefore, it follows that the bonds are valid.

Attention is called to the fact that the act of 1917 provided that the bonds should be "in the sum of $100 each"; whereas, in fact, the bonds as issued have been issued in the sum of $1,000 each. It will be observed, however, that the curative act of 1924 provides that the signatures of the chairman and the clerk of the board "shall be conclusive determination of said form and details." The denomination of the bonds, nothing else appearing, is a detail.

The final inquiry is whether the bonds can be delivered to the railway company. A companion case to this case is *Brummitt, Attorney-General, v. R. R., ante*, 381, in which action the Attorney-General brought a suit to forfeit the charter of Snow Hill Railway Company. This Court held that the Attorney-General had no power to invoke a forfeiture of the charter of Snow Hill Railway Company under the circumstances appearing in the decision. The judgment of the trial court in requiring the bonds to be canceled was based entirely upon the proposition that the charter of the Snow Hill Railway Company had been forfeited and that the railroad, when completed, would engage in interstate commerce, contrary to law. The act of 1917, and the act of 1924 specified certain conditions under which the bonds may be delivered. Unless the Snow Hill Railway Company can comply with all statutory conditions, no valid delivery of the bonds can be made to it. This phase of the controversy, however, is not before us, and this opinion of the Court is confined exclusively to the questions of law discussed and decided herein.

Reversed.

A. L. OWENS v. E. D. CARSTARPHEN.

(Filed 11 September, 1929.)

1. **Sales H a—In this case held: evidence did not show total failure of consideration in sale of bank stock.**

   Where in an action on a note, the evidence tends to show that the consideration for the note was certain shares of bank stock and the promise of the payee to make the payer a director of the bank, and that the payer was made a director and, acting as such director, voted for and received dividends upon his stock, the execution of the note being admitted, upon the later insolvency of the bank the payer may not maintain the position that there was a total failure of consideration, and an instruction that the jury should answer the issue of indebtedness in favor of the defendant if they found the stock to be worthless is reversible error.

2. **Contracts D a—Party may not accept benefits of contract and at same time deny its validity.**

   A party may not accept the benefits of a contract and at the same time deny its validity.

APPEAL by plaintiff from *Devin, J.*, at July Term, 1929, of WASHINGTON. New trial.

Edward L. Owens and Zeb Vance Norman for plaintiff.
Martin & Martin for defendant.

PER CURIAM. The plaintiff brought suit to recover the amount alleged to be due on a negotiable promissory note in the sum of $250 executed and delivered to him by the defendant on 14 January, 1920, payable 1 January, 1921, for the purchase of two shares of stock in the Bank of Plymouth. The defendant admitted the execution of the note, but alleged that the bank was insolvent and the stock worthless when the note was signed and the certificate of stock received, and pleaded total failure of consideration in bar of the plaintiff's recovery. His Honor instructed the jury to answer the issue of indebtedness in favor of the defendant if they found that the stock was worthless at the time of the transaction, and that there was in this respect a failure of consideration. To this instruction the plaintiff excepted.

The plaintiff testified that in January, 1920, the Bank of Plymouth was in his opinion as solvent as any bank; that it had no bad paper; that its assets were good, and that its stock was worth more than the purchase price.

The bank and another were consolidated in 1922 under the name of the United Commercial Bank, for which a receiver was afterwards appointed.

According to the defendant's testimony the consideration for the note was the stock he purchased and the plaintiff's promise to make him a director of the bank. A week after the note was executed the plaintiff's promise was fulfilled, and the defendant served as a director for two years thereafter. During each year he voted for and received a dividend of six per cent on his stock. He testified, "I helped declare these dividends and received my part; the board of directors of which I was one paid a dividend one year on something worthless."

True, the defendant says that after two years he found the stock was worthless when he gave the note; but according to his own testimony it was not without value, for he received annual dividends of several dollars each. If the dividends were permissible the investment was a good one; if not permissible the defendant, in his capacity as director should have known it, and in either event he cannot be permitted to accept the benefits of his contract and at the same time deny its validity. Particularly is this true when as he admits he paid interest on his note for six years—four years after his alleged discovery that the stock was worthless. Moreover, the promise of a place on the board of directors held out the "thought of a big job," as he said; and if the "job" was not as great as anticipated the fact remains that a promise for a promise is itself a consideration.

The question of a partial failure of consideration seems not to have been considered. We do not intend to intimate that it would or would not have been a defense *pro tanto.* C. S., 3008. There must be a

New trial.

W. E. HARRELL v. I. A. TRIPP ET AL.

(Filed 18 September, 1929.)

1. **Trial E c—Instructions that omit contention of defense supported by evidence held erroneous.**

   Where, in an action in claim and delivery involving the title to an automobile, there is evidence tending to show that the plaintiff bought the car for himself and *per contra* that he made a gift of the car to the two daughters by delivering the car with intent to pass title either to their father for them or to them direct, an instruction that limits the defense to the evidence to the effect of an immediate delivery by the father to his daughters and deprives the defendant of their defense upon the second phase thereof of the gift direct to the daughters is reversible error.

2. **Gifts A a—Actual or constructive delivery with present intent to pass title necessary to gift inter vivos.**

   To constitute a gift of personal property *inter vivos* there must be actual or constructive delivery of the thing given with the present intent to pass the title to the donee.

3. **Replevin G a—The correct form of judgment for plaintiff in action in claim and delivery.**

   Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against him should require the delivery of the property with damages for its detention and costs and against the surety on the bond for damages and costs within the amount of the penalty thereon, or, in the event that delivery of the property cannot be had, for the value at the time of its wrongful detention with interest as damages therefrom, and costs, and likewise against the surety within the penalty of the bond, the surety to be discharged upon such payment.

APPEAL by defendants from *Cowper, Special Judge,* at Special March Term, 1929, of BERTIE.

Action in claim and delivery to recover the possession of one Ford coupe, Engine No. 11710751. The property was seized by the sheriff, but before its delivery to the plaintiff, the defendant, I. A. Tripp, replevied and retained possession thereof by giving bond as required by law, with H. P. Sewell as surety.

Plaintiff contends that he bought the car in question and loaned it to I. A. Tripp for the use of his two daughters. The defendants, on the other hand, contend that the plaintiff bought the car and gave it outright to Estelle and Elizabeth Tripp.

It is conceded that the plaintiff took I. A. Tripp along with him when he purchased the car and permitted or requested the said Tripp to drive it home, the plaintiff preceding him in his Buick automobile. When they arrived at the Tripp home, Estelle Tripp testifies that the plaintiff said: "There is the car; get in and take a ride." She further testified: "Mr. Harrell stayed while Elizabeth, father and I went to ride. We kept the car five or six weeks before this action was begun."

It is suggested that the plaintiff wished to marry one of the young ladies at the time he purchased the car and had her father drive it home, but, failing in this, he now desires to repossess it. Title to the car, at the time it was purchased, 10 July, 1925, was issued in the name of I. A. Tripp. Another certificate of title was issued to the plaintiff for the same car on 28 July, 1925, without the first being surrendered or canceled.

The jury answered the issue of ownership in favor of the plaintiff and fixed the value of the car at $550. Judgment on the verdict for plaintiff with the following provision inserted therein: "And it appearing that the value of the said car has been fixed at the sum of $550 on the day of seizure of the same, it is further considered and adjudged that plaintiff, W. E. Harrell, recover of I. A. Tripp and H. P. Sewell, surety upon the replevy bond, the sum of $550 with interest thereon from 18 July, 1925, and the costs of this action to be taxed by the clerk of this court." Exception by defendants.

The defendants appeal, assigning errors.

Gillam & Spruill and Winston & Matthews for plaintiff.
L. W. Gaylord and J. A. Pritchett for defendants.

STACY, C. J., after stating the case: The validity of the trial is called in question by a number of exceptions and assignments of error, but consideration of them *seriatim* is omitted, as we deem it necessary to award a new trial for error in the following instruction on the issue of ownership, which forms the basis of one of the defendants' exceptive assignments of error:

"The court further charges the jury that if the jury shall find from the evidence that the plaintiff permitted Mr. Tripp to drive the car to his home, but that he did not either by words or by unequivocal conduct, authorize the father to deliver the said car to his daughters, and that the said car was not immediately upon the surrender of the same to Mr. Tripp, placed in the possession of or control of the daughters, then the jury will answer the first issue, Yes."

The vice of this instruction lies in the fact that it requires an undue immediacy of delivery on the part of Mr. Tripp to his daughters, and further deprives the defendants of their contention, based on the testimony of Estelle Tripp, that delivery of the car was made direct to the *feme* defendants by the plaintiff himself. The position of the defendants that the instruction is unduly restrictive of their evidence would seem to be well taken.

The decisions in this jurisdiction are to the effect that, to constitute a valid gift of personal property *inter vivos,* there must be an actual or constructive delivery of the thing given with the present intent to pass the title to the donee. *Handley v. Warren,* 185 N. C., 95, 116 S. E., 168; *Patton v. Heath,* 190 N. C., 586, 130 S. E., 500; *Thomas v. Houston,* 181 N. C., 91, 106 S. E., 466. "To constitute a valid gift *inter vivos* there must be an intention to give and a delivery to the donee, or to some one for him, of the property given." *Harris Banking Co. v. Miller,* 1 L. R. A. (N. S.), 790. See, also, *Parker v. Mott,* 181 N. C., 435, 107 S. E., 500 and cases there cited.

It would also seem that the form of the judgment as pointed out in *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466, should be "for the possession of the property, or for the recovery of the possession, or for the value thereof in case a delivery cannot be had, and damages for the detention" (C. S., 610), plus costs, with the further provision that the plaintiff recover of the surety on the defendant's replevy bond the full amount of such bond, to be discharged, first, upon the return of the property and the payment of the damages and costs recovered by the plaintiff; or, second, if a return of the property cannot be had, upon the payment to the plaintiff of such sum as may be recovered against the defendant for the value of the property at the time of its wrongful taking and detention, with interest thereon as damages for such taking and detention, together with the costs of the action, the total recovery against the surety in no event to exceed the penalty of the bond. *Polson v. Strickland,* 193 N. C., 299, 136 S. E., 873.

For the errors, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

M. B. STONE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 September, 1929.)

1. **Appeal and Error G b—Exceptions not discussed in briefs are deemed abandoned on appeal.**

Assignments of error based on exceptions to instructions which are not discussed in the brief filed in the Supreme Court are taken to be abandoned on appeal under Rule 28.

2. **Railroads D b—where railroad knowingly permits use of crossing by public it owes the duty to keep such crossing in reasonably safe condition.**

Where a railroad company has knowingly permitted automobiles and other vehicles to cross its right of way for a long period of time at a certain road crossing, from one public highway to another, it owes the duty to keep such crossing in a reasonably safe condition whether the crossing was constructed by the railroad company or not, and it is liable in damages for injuries proximately caused by its negligent failure to do so. C. S., 3449.

3. **Same—In this case held evidence of railroad's negligent failure to keep crossing in reasonably safe condition sufficient to be submitted to the jury.**

Where a railroad company has knowledge that automobiles and other vehicles have been accustomed to cross its tracks at a certain roadway, for a long period of time, it owes the duty to keep the crossing in reasonably safe condition for this purpose, and where there is evidence tending to show that the public had so crossed at this place for a long period of time and that the railroad company had left a hole on its right of way which caused plaintiff's automobile to get stuck and consequently struck by defendant's train, without fault or negligence on plaintiff's part, the question of defendant's actionable negligence is for the jury under correct instructions from the court.

4. **Appeal and Error E h—Where cause has been tried on one theory in lower court appellant is confined to that theory on appeal.**

Where a running train of defendant railroad company has injured the plaintiff's automobile by a collision with it at a grade crossing, and the sole controverted matter on the trial in the Superior Court related to the question of defendant's negligence in failing to stop its train in time to have avoided the injury, the railroad company may not on appeal assume the position that it is not liable upon a different theory not controverted on the trial in the lower court.

APPEAL by defendant from *Barnhill, J.,* at March Term, 1929, of VANCE. No error.

Action to recover damages resulting from injuries to plaintiff's automobile, caused by the negligence of defendant in failing to exercise due care (1) to maintain a public crossing which passes over its track, in a reasonably safe condition, and (2) to stop its train before it struck and injured the automobile, which by reason of the defective condition of said crossing, plaintiff was unable to drive off or move from said track, in time to avoid the injury.

The issues submitted to the jury were answered as follows:

1. Was the plaintiff's property damaged by the negligence of the defendant, as alleged? Answer: Yes.

2. If so, did plaintiff by his own negligence contribute to his injury and damage? Answer: No.

3. What damages, if any, is plaintiff entitled to recover? Answer: $1,500.

From judgment on the verdict defendant appealed to the Supreme Court.

Perry & Kittrell for plaintiff.
J. H. Bridgers and Murray Allen for defendant.

CONNOR, J. It is not contended by defendant on this appeal that there was error in the trial of this action with respect to the allegation that defendant was negligent in failing to exercise due care to stop its train, and thus avoid the injury to plaintiff's automobile, which was on defendant's track when it was struck and injured by defendant's train. The evidence in support of this allegation, although contradicted by evidence offered by defendant, was submitted to the jury under instructions which are free from error. Assignments of error based on exceptions to these instructions are not discussed in defendant's brief, filed in this Court. They are therefore taken as abandoned on this appeal. Rule 28.

Defendant contends, however, that there was error in the trial with respect to the allegation that defendant was negligent in failing to exercise due care to maintain in a reasonably safe condition the crossing over its track, on which the automobile was standing when it was struck and injured by defendant's train. All the evidence tended to show that the crossing was defective, in that there was a hole on the right of way, just beyond the cross-ties, and that this hole was not discovered by plaintiff before the wheel of his automobile dropped into it, causing the running-board of his automobile to rest upon the ground. Plaintiff was unable to drive his automobile off the track, or to move it therefrom before it was struck and injured by defendant's train, which appeared after plaintiff had driven upon the crossing.

In his complaint plaintiff alleged that the crossing was a public crossing. This allegation was denied by defendant in its answer. All the evidence tended to show that the crossing had been in existence for many years; that it was used generally by the public, and that defendant knew of its existence. There was no evidence tending to contradict the evidence to the effect that it was a public crossing. Plaintiff knew when he drove his automobile on the crossing that it had been used for many years by the public for the purpose of passing over defendant's track, from the public road on one side of the track to the State highway on the other side.

The court instructed the jury in effect that upon all the evidence it was the duty of defendant to exercise due care to maintain the crossing on which plaintiff's automobile was standing when it was struck and injured by defendant's train in a reasonably safe condition, and that if defendant failed to perform this duty, and such failure was the proximate cause of the injuries to plaintiff's automobile, defendant was liable for damages resulting from the injuries.

Defendant contends that there was prejudicial error in this instruction, for that it is assumed therein that the crossing on which plaintiff's automobile was standing when it was struck and injured, is a public crossing, whereas the allegation in the complaint to that effect is denied in the answer. In view of the fact that all the evidence was to the effect that the crossing is a public crossing, and that on the trial defendant did not controvert this evidence, defendant's contention cannot be sustained. Defendant's evidence was directed altogether to support its contention that it was not negligent in failing to stop its train before it struck and injured the automobile. There was apparently no controversy as to the character of the crossing, or as to its defective condition.

The duty of a railroad company with respect to the maintenance of a crossing over its track, where its track has been constructed over an established road or highway, whether public or private, is well settled. The duty is prescribed by statute, C. S., 3449, and has been recognized and enforced by this Court in numerous decisions. In *Goforth v. R. R.*, 144 N. C., 569, 57 S. E., 209, it is said: "It is just that crossings necessitated by the construction and operation of a railroad should be kept in a safe condition by it." As the crossing is on the railroad company's right of way, no one except the company has the right to enter upon the crossing for the purpose of repairing the same.

It is immaterial whether the company constructed the crossing or not. If, with its knowledge and implied consent, the public has used the crossing over its track and right of way for many years, for the purpose of passing from a public road on one side of the track to a public road on the other side, in automobiles or other vehicles, the company owes to those who thus use the crossing the duty to exercise due care to maintain the crossing in a reasonably safe condition. *Bradley v. R. R.*, 126 N. C., 735, 36 S. E., 181. The company cannot be held liable, of course, as an insurer; it is, however, liable for negligence with respect to the condition of the crossing on its right of way. It can relieve itself of liability by closing the crossing, where the public has acquired no right to use it. So long, however, as it permits the public to use the crossing, it must respond in damages caused by its negligence in failing to exercise due care to maintain the crossing in a reasonably safe condition. There is

No error.

NETTIE COWEN v. GABRIEL WILLIAMS ET UX.

(Filed 18 September, 1929.)

1. Bills and Notes A a—Seal on promissory note imports consideration.

Where a husband and wife execute a promissory note under seal secured by a mortgage on lands, the seal affixed thereto imports that a good and sufficient consideration had been given for it, and in an action against them by the holder of the note in due course the defense of *nudum pactum* is not available to the wife.

APPEAL by plaintiff from *Moore, Special Judge,* at April Special Term, 1929, of MARTIN.

Civil action to recover on a promissory note and to foreclose deed of trust given to secure payment of said note.

On 8 March, 1921, Gabriel Williams and wife, Lucy Williams, together with others, executed and delivered their joint promissory note for $1,921.65, due and payable on or before 8 November, 1922, to J. L. Hassell & Co., and to secure the payment of same, executed a deed of trust on a tract of land in Martin County.

The plaintiff is a holder in due course of said note, which is under seal, and is seeking to forclose the security and enforce collection of said note.

Lucy Williams contends that the note is without consideration as to her, and denies liability on this ground.

On this phase of the case, the trial court instructed the jury as follows:

"The defendant contends that you ought to be satisfied by the preponderance or greater weight of the evidence that Lucy Williams was only the wife of Gabriel Williams; that she had no interest in this land except such dower right as she may have and that she got no benefit from the execution of the note; contends that you ought to be satisfied from this evidence and by its greater weight and answer that issue 'No'; that she is not liable for the sum due on the note. . . . The burden is on her to satisfy you by the greater weight or preponderance of the evidence before you can answer it no. If she has so satisfied you, it would be your duty to answer it 'No.' Otherwise, you would answer it 'Yes.' Exception by plaintiff.

From a verdict and judgment relieving Lucy Williams from any and all liability on the note, the plaintiff appeals, assigning errors.

B. A. Critcher for plaintiff.
No counsel appearing for defendants.

STACY, C. J., after stating the case: It would seem that the plea of *nudum pactum* is not open to the defendant, Lucy Williams, as against the plaintiff, who is a holder in due course of the note sued on. Hence the instruction, above set out, which forms the basis of one of the plaintiff's exceptions, we apprehend, should be held for error. *Angier v. Howard,* 94 N. C., 27.

A note under seal imports consideration, and it is presumed from the use of a seal, that the consideration is good and sufficient. *Harrell v. Watson,* 63 N. C., 454; *Wester v. Bailey,* 118 N. C., 193, 24 S. E., 9; *Moose v. Crowell,* 147 N. C., 551, 61 S. E., 524; *Burriss v. Starr,* 165 N. C., 657, 81 S. E., 929. See, also, *Barbee v. Barbee,* 108 N. C., 581, 13 S. E., 215.

For the error, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

S. L. ARRINGTON, ADMINISTRATOR OF MAMIE MORGAN, v. TOWN OF PINETOPS AND HOOKERTON TERMINAL COMPANY; AND MANDY MURPHY v. TOWN OF PINETOPS AND HOOKERTON TERMINAL COMPANY.

(Filed 18 September, 1929.)

1. **Electricity A a—Company transmitting electricity must use care commensurate with danger therefrom.**

A company engaged in the transmission of deadly electric currents by wires strung on poles is held to a high degree of care in the maintenance of this equipment commensurate with the danger, and its failure in this duty renders it liable in damages for injuries proximately caused thereby.

2. **Electricity A d—Evidence that third person impaired power line and left it in dangerous condition sufficient to be submitted to jury in this case.**

Where there is evidence tending to show that a company authorized to do so entered on land upon which power lines were maintained, and excavated sand and gravel therefrom, and in so doing, undermined one of the poles upon which transmission wires were strung so that the pole slipped down until the wires hung about five feet from the ground at a place where it could be reasonably anticipated injury would likely result. and that the company left the wires in this dangerous condition, and that a child caught hold of one of the wires and was killed thereby: *Held*, the evidence was sufficient to take the case to the jury upon the issue of the defendant's actionable negligence.

3. **Electricity A c—In this case held: evidence of failure of town to keep its power line in reasonable repair sufficient to be submitted to the jury.**

Where an incorporated town owns and maintains its own poles and wires for the transmission of electricity from another town from which it buys its power, and there is conflicting evidence that it permitted one of its poles carrying a high voltage wire to remain for a month or more fallen so that the wire hung only five feet from the ground, the question of whether the town, in the exercise of due care, should have discovered and made the necessary repairs is for the jury, and is properly submitted to them upon the issue of its secondary liability for the negligent killing of the plaintiff's intestate in an action against the town and the company impairing the power line.

4. **Electricity A b—In this case held: defendants may not avoid liability on ground that intestate killed by power line was trespasser.**

Where the defendants in an action for the negligent killing of plaintiff's intestate are guilty of negligence proximately causing the injury, in impairing and failing to properly maintain a power line, they may not avoid liability on the ground that plaintiff's intestate was a trespasser when the father of the plaintiff's intestate rented and cultivated a field eleven steps from the power line, and his child was killed by coming in contact with a wire permitted to remain five feet from the ground, the doctrine of attractive nuisances applying under the facts of this case.

CIVIL ACTION, tried before *Small, J.*, at April Term, 1929, of EDGECOMBE.

The evidence tended to show that John R. Pitt owned certain land in Edgecombe County, and on 23 May, 1922, conveyed to the town of Pinetops a right of way across his land for the purpose of erecting a transmission line. This deed was recorded on 8 December, 1926. The town of Pinetops purchased electric power from the town of Tarboro, and in order to convey said power from Tarboro to Pinetops, erected a power line consisting of poles and wires. The line carried thirteen thousand volts of electricity, but this voltage was "stepped down" at Pinetops to twenty-three hundred volts. The poles carrying the power were from thirty-five to thirty-seven feet in height and were erected on top of the bank of a "pretty deep cut" on the right of way of the East Carolina Railway Company. On or about 17 June, 1926, Pitt, the owner of the land, entered into an agreement with the Hookerton Terminal Company by the terms of which the said company was authorized to remove sand and gravel from the area on which the poles were situated. There was further evidence that Louis Morgan, father of the plaintiff, Mamie Morgan, rented a crop from Pitt for the year 1926, and was cultivating cotton in a field bordering the transmission line. The edge of Morgan's cotton field was only eleven steps from the power line. There was further evidence tending to show that prior to 6 December, 1926, the Hookerton Terminal Company, in excavating sand and gravel, had undermined one of the poles of said transmission line, which caused the pole to drop down into the excavation, leaving the wires thereon from five to seven feet above the ground on the top of the embankment. On 6 December, 1926, Mamie Morgan, a child about twelve years and ten months old, went into the woods adjoining the field of her father. Coming back from the woods to her work in the field she stopped at the pole in controversy, apparently looking over the embankment into the sand pit below.

The half sister of the deceased, the only eye witness, gave the following narrative: "We came back from the woods and passed by the pole coming back about a yard from it; we stopped and were looking at the sand digger; it was not working. I didn't see anybody on it; we didn't stay there long; I turned around and was coming back to the field and missed Mamie; when I turned to go back to the field is when I missed Mamie; I heard a roaring; I hollered and called Gus and looked around. I saw Mamie standing there; she couldn't get away; her right hand up above her head; she was not so far from the edge of that place; I don't think she was standing on her tiptoes, the best I can remember her hand that was sticking up was touching the wire. I had my back to her and turned around and saw her, and she was standing on the ground, had one hand up above her head on the wire; she didn't stay there long. I screamed and called Gus and Mandy, and Mandy pulled Mamie away, and the wire slung her off. She lay flat on her back on the ground. . . . We walked straight under the wire and looked over the embankment; I peeped over there."

Apparently Mamie Morgan was killed instantly.

The other plaintiff, Mandy Murphy, sister of Mamie Morgan, testified that she heard hollering and looked and saw her sister Mamie on the wire. She said: "I ran there to pull her away, and when I was pulling her away the electricity from her drew me to the pole. I don't remember anything else that happened because I was speechless, and when I came to I was at the house. I felt just like somebody dead, and my left foot and right hand were burned."

There was testimony that from the point where the pole rested on the top of the bank to the wires was about five feet. There was also testimony to the contrary. There was also evidence tending to show that the pole had been in the condition described by witnesses from about 16

October, 1926. There was also strong testimony offered by the defendants to the effect that the pole had been inspected a few days before the death of Mamie Morgan, and that it was then standing and had not been undermined.

The cases were consolidated, and issues of negligence, contributory negligence, and primary and secondary liability were submitted in both cases. The jury answered all the issues in favor of plaintiffs, awarding $1,500 damages in the death case and $250 damages in the case of Mandy Murphy. The verdict also established primary liability against the defendant, Hookerton Terminal Company, and secondary liability against the town of Pinetops.

From judgment upon the verdict both defendants appealed.

Battle & Winslow for plaintiff.

Henry C. Bourne for Hookerton Terminal Company.

Albion Dunn, H. H. Phillips and J. L. Bridgers for Town of Pinetops.

BROGDEN, J. The plaintiffs seek to recover damages from both defendants upon two theories:

1. That the defendant, Hookerton Terminal Company, negligently excavated around the pole, causing it to slip into the cut and thus leaving the wires, carrying an enormous voltage, only five feet above the ground and adjacent to a cultivated field.

2. That the town of Pinetops was negligent in not discovering the condition of said pole and permitting it to remain in a dangerous situation for an unreasonable length of time.

In *Ellis v. Power Co.,* 193 N. C., 357, 137 S. E., 163, it is declared: "that electric power is an industry-producing agency, and the hydroelectric development has been one of the greatest factors in the State's progress, and especially its industrial expansion. Every legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes, and elsewhere. On the other hand, the highest degree of care should be required in the manufacture and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power."

The principles of law creating liability have been declared and reiterated in many decisions of this Court. *Harrington v. Wadesboro,* 153 N. C., 437, 69 S. E., 399; *Ferrell v. Cotton Mills,* 157 N. C., 528, 73 S. E., 142; *Ferrell v. R. R.,* 172 N. C., 682, 90 S. E., 893; *Graham v. Power Co.,* 189 N. C., 382, 127 S. E., 429; *Helms v. Power Co.,* 192 N. C., 784, 136 S. E., 9; *Ellis v. Power Co.,* 193 N. C., 357, 137 S. E., 163; *Ramsey v. Power Co.*, 195 N. C., 788, 143 S. E., 861; *Murphy v. Power Co.*, 196 N. C., 484, 146 S. E., 204. In *Graham v. Power Co.* this Court approved the rule of liability announced by the Court of West Virginia in *Love v. Virginia Power Co.*, 86 W. Va., 393. The rule is thus stated: "A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure, or curiosity, and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precaution for their safety by insulation of the wire or other adequate means." The principle underlying the rule is to the effect that, when any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to other persons, known or unknown, the law imposes as a public duty the obligation to exercise such care and skill. *Ferrell v. R. R.*, 172 N. C., 682. Again in *Helms v. Power Co.*, 192 N. C., 784, this Court declared: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires."

Applying these principles to the case at bar, it is obvious that permitting an uninsulated wire, carrying thirteen thousand volts of electricity, to remain only five feet from the ground, near a cotton field, where people are constantly at work, created a dangerous situation. Under such circumstances severe injury or death ought reasonably to have been anticipated. In effect the defendant, Hookerton Terminal Company, undermined a pole, causing it to slip down until high powered wires were within five feet of the ground. To leave a live wire charged with deadly current in such condition was evidence of negligence to be submitted to the jury.

The question as to whether the town of Pinetops, in the exercise of due care, should have discovered the condition of the wire and to have made the necessary repairs, was a question of fact for the jury. Certainly this Court cannot declare, as a matter of law, that the town of Pinetops was free from negligence under the facts and circumstances disclosed at the trial of the cause.

The Hookerton Terminal Company insists that the little girl was a trespasser upon its property and that her administrator should not be allowed to recover. The identical contention was made in the case of *Ferrell v. R. R.*, 172 N. C., 682. The Court, however, in disposing of this defense, says: "It is undoubtedly the general rule that a trespasser cannot maintain an action against the owner for negligent injuries received by reason of conditions existent upon the premises, but this is a principle growing out of and dependent upon the right of ownership and considered essential to their proper enjoyment." . . .

Louis Morgan, father of plaintiff, testified that he rented the land up to the right of way of the railroad. If so, he and his children, in cultivating the cotton field, had a right to use the land, and the defendant, Hookerton Terminal Company, was charged with notice that these children were working in the field only eleven steps away, and that they had a right to use the woods for any lawful purpose. While there was no pathway or walkway at the place where the pole was excavated, still these children, doubtless attracted by the machinery and sand pit, could not be reasonably held as trespassers in a legal sense because they came up to the bank out of curiosity and peeped over into the sand pit.

No error.

H. W. QUALLS v. THE FARMERS AND MERCHANTS BANK.

(Filed 18 September, 1929.)

1. **Bills and Notes I c—Bank of deposit sending check in due course to its reputable correspondent bank for collection is not liable thereon.**

   A bank receiving from the payee a check on a bank in a different town performs its duty by sending it for collection in due course to its reputable correspondent bank at or near the place of payment.

2. **Same—Bank in course of collection is agent of payee and not the bank of deposit.**

   Where a bank receives from the payee a check drawn on a bank in a different town, and sends it in due course to its reputable correspondent bank, which sends it to an intermediate bank for collection: *Held*, the bank in course of collection is the agent of the payee and not the bank of deposit, and the bank of deposit is not liable to the payee for the negligence, if any, of the collecting bank.

3. **Same—Check received by drawee bank through the mail is payable by it by draft on another bank.**

   Where the payee of a check drawn on a bank in a different town deposits it for collection in a bank without requesting that payment by the drawee bank be demanded in cash, and in due course of collection the check is sent by the bank of deposit to its reputable correspondent bank, which in turn sends it to an intermediate bank for collection: *Held*, the check, being sent through the postoffice, is payable by the drawee bank by its draft on its reserve funds in another bank, and the bank of deposit is not liable to the payee upon the ultimate nonpayment of the check because of the insolvency and nonpayment of the draft of the drawee bank. Public Laws of 1921, ch. 4, sec. 39.

4. **Same—Bank of deposit not liable for failure to give prompt notice of nonpayment of check when damages are not shown to have resulted therefrom.**

The failure of the bank of deposit to promptly notify the payee of the nonpayment of a check deposited by him will not subject the bank to liability in damages when no damages are shown to have resulted therefrom.

APPEAL by plaintiff from *Barnhill, J.*, at March Term, 1929, of HALIFAX.

Submission of controversy without action under C. S., 626, upon the following facts:

1. The plaintiff is a resident of Halifax County, N. C., and the Farmers and Merchants Bank was a banking corporation under the laws of the State of North Carolina, with its principal place of business in Littleton, Halifax County, N. C.

2. On or about 17 December, 1925, O. B. Taylor & Co., for value, drew its check on the Bank of Whitakers, a bank then doing business under the laws of the State of North Carolina, with its principal place of business in Whitakers, N. C., said check being in favor of Louis Lynch, and in the sum of $390.55, which said check was, in due course, for value, endorsed by the said Louis Lynch, to the order of H. W. Qualls.

3. On 21 December, 1925, H. W. Qualls deposited said check for collection with said Farmers and Merchants Bank, using therefor a deposit slip furnished by said bank on which is the following notation: "All items are accepted at the depositor's risk until we have received final actual payment. We assume no liability beyond due diligence in forwarding items to any bank or collection agency."

4. On said date, 21 December, 1925, the account of the said Qualls with said Farmers and Merchants Bank was duly credited with the amount of said check, to wit, the sum of $390.55; and that on the same date the said bank forwarded said check for collection to the First National Bank of Portsmouth, Virginia, a duly organized and acting bank, and the regular correspondent of the Farmers and Merchants Bank, which said check was received by said First National Bank of Portsmouth on 23 December, 1925.

5. The First National Bank of Portsmouth, on 23 December, 1925, forwarded said check to the Merchants National Bank of Richmond, Virginia, which bank, on the next day received same and forwarded it to the Bank of Whitakers for payment.

6. On 30 December, 1925, the Bank of Whitakers sent to the Merchants National Bank of Richmond, Va., its draft on the National Bank of Commerce of Norfolk, Va., in payment of said item, which was duly presented and payment was refused because the Bank of Whitakers did not have sufficient funds available with which to pay it. Thereafter, the First National Bank of Portsmouth, Virginia, charged back against the Farmers and Merchants Bank of Littleton, N. C., the amount of said check, and on 8 January, 1926, the Farmers and Merchants Bank of Littleton charged back said check against the account of the said H. W. Qualls.

7. When said check was sent by the Merchants National Bank of Richmond to the Bank of Whitakers the Bank of Whitakers marked the same paid, and on the first of the following month returned said check to O. B. Taylor & Co., marked paid.

8. On or about 17 December, 1925, the date on which said check was drawn, and continuously thereafter, on the books of the Bank of Whitakers there was to the credit of the defendant, O. B. Taylor & Co., sufficient balance with which to pay said check.

9. During the times above mentioned, and ever since, the Bank of Whitakers was and is insolvent.

10. H. W. Qualls has never been reimbursed on account of said check.

11. The route selected for sending said check by the defendant was the usual and customary one.

12. On 4 January, 1926, the Bank of Whitakers was closed by the Corporation Commission of North Carolina on account of its insolvency.

Upon these facts it was adjudged that the plaintiff recover nothing and that the defendant recover its costs. Affirmed.

Joseph P. Pippin and Dunn & Johnson for plaintiff.
No counsel contra.

ADAMS, J. In *Quarles v. O. B. Taylor & Company and the Farmers and Merchants Bank* we held that as to Taylor & Company the check in controversy had been paid. 195 N. C., 313. The action is now prosecuted against the bank alone.

In this appeal the first question is whether the plaintiff is entitled to prevail on the ground that one of the correspondent banks, the Merchants National Bank of Richmond, instead of demanding the cash, accepted the drawee's check or draft on another bank which was not paid for want of funds. The question involves the legal relation sustained by the plaintiff, not only to the defendant, but to the corresponding banks to whom the check in controversy was sent in due course of the attempted collection; and with us, notwithstanding a divergence of views expressed by various courts, this relation has been definitely determined. We have adopted the Massachusetts rule, which is thus stated: When the first bank transmits the paper with proper instructions to a reputable and proper agent, either in the place where the collection is to be made, or in the place nearest thereto where it has a correspondent or agent whom it deems fit to employ for the purpose of forwarding, it has done its duty, and is not responsible for the negligence of the correspondent or its agents. 1 Morse on Banks (6 ed.), sec. 274. Accordingly, in *Bank v. Bank,* 75 N. C., 534, *Bynum, J.,* cited *Fabens v. Mercantile Bank,* 23 Pickering, 330, and quoted with approval this statement of the principle: "It is well settled that when a note is deposited with a bank for collection which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine it is well settled that if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promisor," . . . to which, in *Bank v. Floyd,* 142 N. C., 187, 191, the words "drawee or payer" are superadded. In the latter case there is a comprehensive discussion of the principle by *Justice H. G. Connor,* who said that *Bank v. Bank, supra,* had been recognized as controlling in this State and as sustained by the weight of authority "in other courts and the reason of the thing." He also approved the proposition affirmed in *Bank v. Bank,* 71 Mo. App., 451, that if a bank receives a paper for collection on a party at a distant place, the agent it employs at the place of payment is the agent of the owner and not of the bank, and if the bank selects a competent and reliable agent and gives proper instructions its responsibilities cease.

In his brief the plaintiff admits we are committed to the Massachusetts Rule, but he insists that our decisions supporting it should be overruled. As an exhaustive investigation of the authorities led to the conclusion reached in *Bank v. Floyd, supra,* that is, that the rule is sustained both by reason and by the weight of judicial thought, we see no convincing reason for receding from the position which has been uniformly upheld by this Court for more than half a century. See Annotation in 52 L. R. A. (N. S.), 608, and in 36 A. L. R., 1308.

The Merchants National Bank of Richmond sent the check to the drawee bank; but if this could formerly have been negligence, as held in *Bank v. Floyd, supra,* and in *Bank v. Trust Co.,* 172 N. C., 345, it would now be recognized as "due diligence" in view of the provisions of Public Laws 1921, ch. 4, sec. 39. It was so held in *Bank v. Barrow,* 189 N. C., 303, 309. The Merchants National Bank of Richmond was the agent of the plaintiff, and its liability to its principal, if any, would not be the liability of the defendant. Besides, as above suggested, under Public Laws 1921, ch. 20, the plaintiff's check having been presented to the drawee through the postoffice was payable by the drawee on exchange drawn on its reserve deposits, in the absence of a contrary specification on the face of the check. The drawer did not on the face of the check demand payment in cash; nor was such demand made by the plaintiff as endorser. The plaintiff's agent, the Merchants National Bank of Richmond, received just what it was authorized to accept. *Braswell v. Bank, ante,* 229.

The second question is whether the defendant was negligent in failing promptly to notify the plaintiff of noncollection. The drawee was closed by the Corporation Commission on 4 January, 1926. It does not clearly appear when the defendant was notified that the First National Bank of Portsmouth had charged back to it the amount of the check; but it does appear that the defendant charged the amount against the account of the plaintiff on 8 January, 1926, and in the absence of specific evidence it is reasonable to infer that the plaintiff was immediately notified. In any event there is no evidence of loss sustained by the plaintiff by reason of the alleged delay.

We concur with his Honor in the conclusion that the facts agreed disclose no such negligence or want of due diligence on the part of the defendant as will subject it to liability in damages to the plaintiff. Judgment

Affirmed.

AULANDER BRICK COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 September, 1929.)

Railroads E a—Action on contract made with Director General of Railroads does not lie against railroad under facts of this case.

A contract made with the Director General of Railroads during Federal control to the effect that the railroad would pay for a side track to plaintiff's manufacuring plant upon condition that the freight tonnage would amount to a certain quantity, which during Federal control it did not do, will not now lie against the railroad company operating its own road, the required tonnage being now the amount agreed upon, the agent designated by the President (U. S. Compiled Statutes, Cum. Sup. 1925, sec. 10071¼ cc) not having been made a party to the action.

APPEAL by plaintiff from a judgment of nonsuit rendered by *Cowper, Special Judge,* at March Special Term, 1929, of BERTIE. Affirmed.

Winston & Matthews for plaintiff.
M. B. Gillam and McLean & Rodman for defendant.

PER CURIAM. The plaintiff brought suit for $750 alleged to be due by the defendant under a written contract executed by the plaintiff and the Director General of Railroads during the period of Federal control. The defendant denied liability and contended that it was not a party to the contract and that the plaintiff did not comply with the provisions of section ten, which is herein set out. At the close of the evidence the action was dismissed as in case of nonsuit and the plaintiff excepted and appealed.

On 19 November, 1919, the plaintiff, a corporation engaged in the manufacture and sale of bricks, and the Director General of Railroads, operating the Atlantic Coast Line Railroad, entered into a written agreement for the construction, maintenance, use, and operation of a sidetrack at Aulander for the convenient conduct of the plaintiff's business. Section 10 of the agreement is as follows:

"It is hereby mutually agreed that if and when, during Federal control of the railroad of the Atlantic Coast Line Railroad Company, there shall have been delivered to the shipper on or forwarded by the shipper from the sidetrack such a number of cars of carload freight yielding road haul revenue to the railroad as, at the rate of $2.00 per car, will produce a sum equal to the cost of the part of the sidetrack on the right of way or premises of the railroad between the switch point and the clearance point, said cost now being estimated at $750, then the railroad will refund to the shipper the cost of such part of the sidetrack, and thereafter such part of the sidetrack between the switch point and the clearance point shall be maintained by the railroad."

It was provided in the Transportation Act of 1920 that actions at law and suits in equity based on causes of action arising out of the possession, use, or operation of the railroad of any carrier of such character as prior to Federal control could have been brought against such carrier, might, after the termination of Federal control, be brought against an agent designated by the President for such purpose. U. S. Compiled Sts., Cum. Sup., 1925, sec. 10071¼ cc.

The stipulated number of cars were not shipped by the plaintiff from the sidetrack during Federal control; nor did the plaintiff bring suit against the Director General or against the agent appointed by the President. Section 9 of the agreement, on which the plaintiff seems chiefly to rely, must be construed in connection with section ten; and when so construed it is obvious that the duties referred to in section 9 are those previously set out. Indeed, the "note" appended to section ten and made a part of the agreement shows that preceding provisions were made "subject to the provisions of paragraph 10 hereof." The judgment is

Affirmed.

C. B. HASSELL v. AMERICAN PEANUT CORPORATION.

(Filed 18 September, 1929.)

Contracts F c—Refusal of trial court to submit instruction on counterclaim held erroneous under the facts of this case.

Where, in an action on contract to recover the purchase price of a carload of peanuts sold and delivered, the defendant sets up a counterclaim for damages for the failure of the plaintiff to ship three other carloads of peanuts under an alleged contract, the plaintiff contending that he was the agent for the purchase of the three carloads and not under contract to ship them: *Held*, under the facts of this case, it was error for the trial court to refuse to give the jury instructions upon the counterclaim so pleaded and proven.

APPEAL by defendant from *Small, J.*, at March Term, 1929, of MARTIN.

Civil action to recover $1,212.08, the price of a carload of peanuts shipped to the defendant at Norfolk, Va., on 8 December, 1927, by the plaintiff who is a resident of Martin County, this State.

The defendant admits liability for the peanuts in question, but sets up a counterclaim for $720 because of the plaintiff's alleged failure to deliver three carloads of peanuts sold to the defendant in November, 1927. The defendant tenders judgment for the difference between the plaintiff's claim and its counterclaim.

Plaintiff denies liability for failure to deliver the three cars in November, alleging that he purchased same as agent of the defendant and because of a rising market was not able to secure deliveries from those who agreed to sell to him.

From a verdict and judgment in favor of the plaintiff and denying the defendant any recovery on its counterclaim, the defendant appeals, assigning errors.

B. A. Critcher, A. R. Dunning and Ward & Grimes for plaintiff.
Stanly Winborne and H. W. Stubbs for defendant.

PER CURIAM. Without detailing the evidence, or the long correspondence had between the parties, we are of opinion that a contract of sale for the three carloads of peanuts, as alleged by the defendant in its counterclaim, rather than one of agency, has been established and that the defendant is entitled to have the jury assess its damages for the breach of said contract. The court's refusal so to instruct the jury was error.

New trial.

STATE v. PERCY MILLER.

(Filed 25 September, 1929.)

1. **Arrest B a—Officer making arrest may use force apparently necessary for the purpose.**

An officer of the law in making an arrest is required to execute his warrant by overcoming force with such sufficient force as is apparently necessary under the circumstances to comply with his duty at the time, and in so doing he is regarded in law as rightfully the aggressor.

2. **Homicide B a—Evidence of premeditation held sufficient to sustain verdict of first degree murder in this case.**

Where there is evidence that the prisoner had been engaged in manufacturing intoxicating liquors in violation of statute and had threatened to kill any officer who attempted to arrest him, particularly the deceased, and this threat was made known to the deceased, who was killed by the prisoner in a gun battle on the street while the deceased was attempting to arrest the prisoner under a valid warrant: *Held*, the evidence of deliberation and premeditation is sufficient to sustain a verdict of guilty of murder in the first degree.

3. **Same—Voluntary intoxication to carry out premeditated murder does not mitigate the offense of first degree murder.**

Where one with a previously fixed purpose to kill an officer if the officer attempted to arrest him, voluntarily intoxicates himself to carry out his purpose, or deliberately brings on the difficulty when the officer attempts to arrest him under a valid warrant, and kills the officer according to his previously fixed design, the law will not mitigate the offense, but pronounces his crime murder in the first degree.

4. **Homicide A a—Premeditation and deliberation are the distinctive elements of murder in the first degree.**

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; while murder in the second degree is the unlawful killing of a human being with malice, the presence in one case of premeditation and deliberation being the distinguishing difference between these two grades of an unlawful homicide.

5. **Same—Presumptions from use of deadly weapon and burden of showing premeditation necessary for first degree murder.**

The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. C. S., 4200.

APPEAL by defendant from *Moore, Special Judge,* May Term, 1929, of BERTIE.

Criminal prosecution, tried upon an indictment charging the defendant with a capital felony, murder in the first degree.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Phillip A. Escoffery for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on Sunday afternoon, 10 February, 1929, the prisoner, Percy Miller, a colored man, shot and killed Patrick White, chief of police of the town of Windsor, Bertie County, while the latter, in the discharge of his duties as an officer, was attempting to arrest the prisoner or to prevent his forcible escape from custody. The defendant, on a number of occasions, sometimes when drinking and others when sober, and once while at a still, had threatened to kill any officer who attempted to arrest him, and several times the deceased was singled out as the object of his threats: "The first time the s-o-b policeman (Patrick White) arrests me, I am going to kill him." And again: "If Sheriff White comes up here (to the still), I would shoot hell out of him." Dewey Smithwick, knowing that a warrant was out for the defendant, asked him "if they wouldn't get him if he went around town now?" His reply was: "I would like to see anybody try to arrest me. I will kill the first s-o-b that does." These threats were communicated to the deceased. About eight or nine minutes before the homicide, the defendant was in the street, in front of Boone's Cafe, apparently under the influence of an intoxicant, with a pistol in his hand, flashing it around, saying that he wanted to kill somebody—some s-o-b. There were no eye-witnesses to the homicide, but from the number of shots heard, the prisoner and the chief of police were apparently engaged in a gun battle, in the middle of the street, when the fatal shot was fired. The deceased was shot in the heart and died instantly. His pistol was found four steps back of his body. A few minutes before the shooting, the officer was seen holding the defendant by the arm or shoulder, while the prisoner seemed to be in a resisting position.

The prisoner, who testified that he was not drinking on the day in question, tendered a plea of murder in the second degree, but this was not accepted by the State. The appeal, therefore, presents the single question as to whether the evidence tending to show premeditation and deliberation is sufficient to warrant a verdict of murder in the first degree. We think it is. *S. v. McClure,* 166 N. C., 321, 81 S. E., 458; *S. v. Durham,* 141 N. C., 741, 53 S. E., 720; *S. v. Kale,* 124 N. C., 816, 32 S. E., 892.

That the prisoner had premeditated upon the killing, "thought of it beforehand," is amply shown from the threats made against the officer; and where one with a previously fixed purpose to kill, formed while sober, deliberately bringing on a difficulty, or voluntarily intoxicates himself in order to carry out his previously fixed design, and under such circumstances, kills his intended victim, the law will not excuse him or mitigate his offense, but pronounces his crime murder in the first degree. *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Murphy,* 157 N. C., 614, 72 S. E., 1075.

It is in evidence that the officer was within his rights in arresting or attempting to arrest the defendant. *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617. And it is the law of this jurisdiction that forcible resistance to the execution of legal warrants, or lawful arrests, will not be sanctioned. *S. v. Phillips,* 119 Iowa, 652, 67 L. R. A., 292, and note.

Speaking to the subject in *Holloway v. Moser,* 193 N. C., 185, 136 S. E., 375, it was said: "As against those who defy its decrees and threaten violence to its officers, the law commands that its writs be executed, peaceably, if they can; forcibly, if they must. *S. v. Garrett,* 60 N. C., 144. An officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life, if necessary. *S. v. Dunning,* 177 N. C., 559, 98 S. E., 530. And he is not required, under such circumstances, to afford the accused equal opportunities with him in the struggle. He is rightfully the aggressor, and he may use such force as is necessary to overcome any resistance. He is not bound to put off the arrest until a more favorable time. *S. v. McMahan,* 103 N. C., 379, 9 S. E., 489; *S. v. Gosnell,* 74 Fed., 734. 'His duty is to overcome all resistance, and bring the party to be arrested under physical restraint, and the means he may use must be coextensive with the duty, and so the law is written'—*Black, J.,* in *S. v. Fuller,* 96 Mo., 165. If the offender put the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must be careful not to use any greater force than is reasonably and apparently necessary under the circumstances, for necessity, real or apparent, is the ground upon which the law permits the taking of life in such cases. *Head v. Martin,* 85 Ky., 480. It has been said, however, that where officers of the law, engaged in making arrests, are acting in good faith, and force is required to be used, their conduct should not be weighed in golden scales. *S. v. Pugh,* 101 N. C., 737, 7 S. E., 757; *S. v. McNinch,* 90 N. C., 696."

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; while murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. The presence in the one case of premeditation and deliberation and the absence in the other of one or both of these elements is the distinguishing difference between these two grades of an unlawful homicide. *S. v. Benson, supra.*

When on a trial for homicide, a killing with a deadly weapon is admitted or established by the evidence, the law raises two—and only two—presumptions against the slayer: first, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Fowler,* 151 N. C., 731, 66 S. E., 567. The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431. It is provided by C. S., 4200, that a murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree, punishable by death, and all other kinds of murder shall be deemed murder in the second degree, punishable by imprisonment in the State's prison. *S. v. Banks,* 143 N. C., 652, 57 S. E., 174; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

The verdict in the instant case is warranted by the evidence, and no sufficient reason has been shown for disturbing the judgment.

No error.

JOE BATTLE v. P. C. SHORE.

(Filed 25 September, 1929.)

Descent and Distribution B b—Wife's illegitimate children take to exclusion of husband's illegitimate child upon a devise to their heirs.

A devise of lands by the testator to his wife for life and at her death to his and her heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his illegitimate child. C. S., 1654, Rule 9.

APPEAL by plaintiff from *Barnhill, J.*, at May Term, 1929, of EDGECOMBE. Affirmed.

Action to enforce the specific performance of a contract to convey land. Defendant declined to accept the deed tendered by plaintiff, and to pay the purchase money for said land, on the ground that plaintiff was not the owner of the land which he had contracted to sell and convey to the defendant.

From judgment on the facts admitted in the pleadings, plaintiff appealed to the Supreme Court.

J. P. Bunn for plaintiff.
Spruill & Spruill for defendant.

CONNOR, J. The only question presented by this appeal is whether the plaintiff is the owner of the land which he has contracted to sell and convey to the plaintiff. The facts involved in this question are admitted in the pleadings. Upon these facts, it was adjudged that plaintiff is not entitled to a decree of specific performance.

Plaintiff claims title to the land under the will of Horace Battle, deceased, which has been duly probated and recorded. Horace Battle was the owner in fee and in possession of the land at the date of his death. By his will he devised the land to his wife, Harriet Battle "for the term of her natural life, and after her death to be equally divided between the heirs of Horace Battle and the heirs of Harriet Battle."

Horace Battle left surviving brothers and sisters, and one illegitimate son, Horace Battle, Jr.

Harriet Battle is dead. She left surviving brothers and sisters, and two illegitimate sons, James Battle and plaintiff, Joe Battle.

Both James Battle, illegitimate son of Harriet Battle, and Horace Battle, Jr., illegitimate son of Horace Battle, the testator, by deeds which have been duly recorded, have conveyed all their right, title and interest in and to the land, to the plaintiff, Joe Battle, who contends that by virtue of said deeds and of the will of Horace Battle, Sr., he is now the owner of said land. This contention cannot be sustained.

Upon the death of Harriet Battle, her sons, James Battle and Joe Battle, although illegitimate, by virtue of the statute, became her heirs. C. S., 1654, Rule 9. *Wilson v. Wilson,* 189 N. C., 85, 126 S. E., 181. Under the will of Horace Battle, they therefore became the owners as tenants in common of an undivided one-half interest in said land. By the deed of James Battle, the plaintiff became and is now the owner of said undivided half interest.

Horace Battle, Jr., although the son of Horace Battle, the testator, was not his heir, for it is admitted that he is illegitimate. He did not, therefore, take any interest in the land under the will, or otherwise. The plaintiff, Joe Battle, acquired no right, title or interest in or to the land by virtue of the deed to him from Horace Battle, Jr. He is, therefore, not the owner of the one-half undivided interest in the land which was devised to the heirs of Horace Battle. As he is the owner of only the one-half undivided interest in the land, which was devised to the heirs of Harriet Battle, he is not entitled to a decree for the specific performance by the defendant of his contract to purchase and pay for the land. The judgment is

Affirmed.

W. S. WOLFE v. THE TOWN OF MOUNT AIRY ET AL.

(Filed 25 September, 1929.)

Taxation A a—Where voters have approved payment of municipal debt a vote on the issuance of bonds therefor is unnecessary.

Where a deficit has accumulated in the running expenses of a public school of a township, and the voters of the township under a valid statute have approved its payment by the township, it is not necessary that the question of the issuance of bonds, authorized by a later statute for paying the indebtedness, be submitted to the voters of the township in order to validate the bonds so issued, the later statute merely prescribing the method by which the former authority should be executed.

APPEAL by plaintiff from *McElroy, J.,* 3 August, 1929, from SURRY.

Controversy without action, submitted on an agreed statement of facts to determine the validity of certain bonds of the town of Mount Airy.

The facts, so far as essential to a proper understanding of the legal question involved, may be abridged and stated as follows:

1. Pursuant to the provisions of chapter 37, Private Laws 1927, an election was held in the town of Mount Airy and carried by which the commissioners of said town, among other things, were authorized to

assume and pay off an accumulated deficit or school indebtedness of $35,000, but no reference was made in said act to the manner in which this should be done. Hence, while the indebtedness was approved, the question as to whether bonds should be issued to care for the outstanding deficit which had accumulated in the operation of the public schools over a period of several years, was not submitted to a vote of the people.

2. Thereafter, the Legislature of 1929, Private Laws, ch. 171, without a vote of the people, authorized the commissioners of the town of Mount Airy to issue bonds for the payment of said indebtedness.

3. It is the contention of the plaintiff that as the act of 1927 did not specifically authorize the issuance of bonds to care for said indebtedness, the same has not been approved by a vote of the people—the act of 1929 not being submitted to a vote—and that said proposed bonds are therefore not valid obligations of the town.

From a judgment holding the bonds to be valid, and dismissing the action, the plaintiff appeals, assigning error.

Geo. K. Snow for plaintiff.
Folger & Folger for defendants.

STACY, C. J. Objection is made to the validity of the bonds in question on the ground that the act of 1927, calling for an election, did not specifically authorize the issuance of bonds, though payment of the indebtedness was approved by a majority of the qualified voters. The objection is untenable. *Jones v. Board of Education,* 185 N. C., 303, 117 S. E., 37; *Honeycutt v. Commissioners,* 182 N. C., 319, 109 S. E., 4.

Whatever difference of opinion may be found in the decisions elsewhere, it has been held with us, in a number of cases, that "when the power to incur a debt for necessary expense exists (and we may add when an outstanding indebtedness has been properly approved), there would seem to be no good reason of law to prevent the governing authorities of a town from making provision for the present or ultimate payment of such a debt by issuing bonds for the purpose, if good business prudence and existing conditions are such as to render this course desirable and proper." *Commissioners v. Webb,* 148 N. C., 120, 61 S. E., 670; *Jones v. Commissioners,* 137 N. C., 579, 50 S. E., 291. This was approved in *Bennett v. Commissioners,* 173 N. C., 625, 92 S. E., 603, where *Hoke, J.,* writing the opinion, took occasion to say: "True, we have held in this jurisdiction that when county commissioners have power to contract a debt or to provide for valid debts already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation, the right of taxation therefor being restricted to the constitutional limitations as to debts incurred since the same was adopted," citing as authority for the position, *Commissioners v. Webb,* 148 N. C., 120; *McCless v. Meekins,* 117 N. C., 34; *French v. Commissioners,* 74 N. C., 692; *Johnston v. Commissioners,* 67 N. C., 103.

Under these authorities the trial court correctly held that the act of 1929, authorizing the commissioners to issue bonds for the payment of the indebtedness previously incurred and properly approved, was valid without being submitted to a vote of the people.

The judgment upholding the bonds and dismissing the action will be Affirmed.

NEVER FAIL LAND COMPANY v. S. F. COLE, PAGE TRUST COMPANY AND KYLE MATTHEWS, SHERIFF OF HARNETT COUNTY.

(Filed 25 September, 1929.)

1. **Appeal and Error J a—On appeal in injunction proceedings the evidence is reviewable, but the judgment of the lower court is presumed correct.**

While the Supreme Court may review the evidence on appeal in injunction proceedings, there remains the presumption that the proceedings and judgment of the lower court are correct with the burden of proof on the appellant to show error.

2. **Replevin G b—Notice to principal of motions in action in claim and delivery is notice to the surety on his bond.**

The sureties on a replevy bond in claim and delivery are parties of record in an action on the bond before final judgment has been rendered, and notice to the principal on the bond is sufficient notice to the surety of every motion or proceeding made in the ordinary and reasonable purview and compass of the action.

3. **Same—After final judgment notice to the principal on bond in claim and delivery of motions therein is not notice to his sureties.**

A judgment in claim and delivery proceedings which adjudicate and determine the rights of the parties to the action without reservation of further power by the court to proceed therein is a final judgment, and notice thereafter to the principal on the replevy bond of further proceedings therein on motion of a party, which substantially changes the effect of the judgment, is not notice to the sureties on his bond, the effect of the judgment being to terminate the agency of the principal in such instances, and judgment later rendered on the motion does not affect the liability of the sureties, and as to them it is void.

4. Landlord and Tenant H a—Landlord has right of lien for rents and advancements on crops of his tenant's subtenant.

Where a tenant leases the premises to another who raises a crop thereon, the crops so raised by the subtenant are subject to a lien for advances made to him by his immediate lessor and also to the original lessor or owner of the land; and the latter being a landlord's lien is superior to the lien of the lessor tenant, and the crop is subject to seizure for the payment of rent due to the owner of the land. C. S., 2355.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at April Term, 1929, of HARNETT. Error.

Material facts: This is a proceeding for injunction to restrain Kyle Matthews, the sheriff of Harnett County, from selling approximately 5,736.32 acres of land of plaintiff that he had advertised to be sold on Monday, 4 July, 1927, under an execution on an alleged judgment in favor of S. F. Cole and Page Trust Company *v.* S. J. Cooper and S. S. Puckett and Never Fail Land Company, sureties on a replevy bond signed by them. The plaintiff's contention was to the effect:

(1) That it rented its farm land above mentioned the year 1922 to one S. S. Puckett, who agreed to pay plaintiff one-fourth of all crops raised or caused to be raised on the land in said year and advancements made and expenses incurred in making and saving the crops, and Puckett on said contract was indebted to it in the sum of about $1,600.

(2) That Puckett, without plaintiff's consent, subrented the land to one S. J. Cooper, who is largely indebted to Puckett.

(3) That on 2 January, 1923, the defendant, S. F. Cole, took claim and delivery for "All my (S. J. Cooper's) interest in tobacco grown on the Pine View Farm and Puckett Farm, at least 20 acres grown in tobacco in the year 1922." This was done under chattel mortgage made to S. F. Cole by S. J. Cooper. That under said proceeding the sheriff of Harnett County seized on 2 January, 1923, about 2,500 pounds of tobacco raised on the land plaintiff rented to Puckett; that as landlord it has a lien for rent and advances, and it was the property of plaintiff until said rent and advances were paid.

(4) That S. F. Cooper replevied the said tobacco and S. S. Puckett and J. M. Cooper signed the replevy bond as sureties, and the surety bond was also signed by the plaintiff, Never Fail Land Company, by F. W. Hancock, Jr., president.

(5) That the case of S. F. Cole *v.* S. J. Cooper came on for trial at February Term, 1925, of the Superior Court of Moore County, and the following issues were submitted to the jury, and their answers thereto:

"1. Is the defendant indebted to the plaintiff, if so, in what sum? Answer: Yes, the principal sum of $1,135, with interest from 13 January, 1922.

2. Did the defendant convert to his own use the tobacco described in the complaint, or any part thereof? Answer: Yes.

3. What is the value of the tobacco so converted? Answer: $1,400.

4. What was the value at the time of its seizure of the tobacco seized under claim and delivery and replevied by defendant? Answer: $700."

That the judgment at said term (part material for consideration of the case) was as follows: "It is further decreed, ordered and adjudged, that plaintiff further recover judgment against S. S. Puckett and Pineview Farms Company in the sum of $1,500, the penalty of the replevy bond in this action signed by them as sureties, to be discharged upon the payment of $700, the value of the tobacco replevied as fixed by the verdict of the jury, and the further payment of the costs of this action, to be taxed by the clerk. The judgment had no reservations for other and future directions of the court and transcripts were docketed in Moore and Harnett counties.

(6) That on 29 November, 1926, the plaintiff in the action entitled 'S. F. Cole *v.* S. J. Cooper,' filed a motion in the Superior Court of Moore County to set aside the judgment obtained in the said action at the February Term, 1925, for the purpose of having two additional issues submitted to the jury with respect to the identity of the tobacco seized by the sheriff under the claim and delivery writ and the ownership of said tobacco, to have the judgment resigned upon all the issues answered by the jury against the defendant and his sureties, and to have the judgment pronounced and rendered in favor of S. F. Cole, to the use of the Page Trust Company; that notice of the said motion was served on S. J. Cooper, the defendant in said action, on 29 November, 1926, but that no notice of said motion was served on the plaintiff, Never Fail Land Company; that the said S. J. Cooper accepted service of said notice and consented to the motion being granted.

(7) That in accordance with said motion, the said action of S. F. Cole *v.* S. J. Cooper was reopened at the December Term, 1926, of the Superior Court of Moore County, and the following issues were submitted:

'(1) Was the tobacco seized by claim and delivery in this proceeding and replevied by the defendant with S. S. Puckett and Never Fail Land Company, as sureties, a portion of the tobacco described in the mortgage set out in the complaint? Answer: Yes.

(2) Was the plaintiff the owner and entitled to the possession of all of the tobacco described in the complaint at the beginning of this action by virtue of the chattel mortgage therein described? Answer: Yes.' "

That at the December Term, 1926, of the Superior Court of Moore County, judgment was rendered in the said action, which said judgment is entitled "S. F. Cole (to the use of Page Trust Company) the plaintiff, *v.* S. J. Cooper, defendant." That the said judgment, among other things, decrees as follows: "It is further decreed, ordered and adjudged, that plaintiff is the owner of the tobacco replevied by defendant with S. S. Puckett and Never Fail Land Company as his sureties on his replevy bond; and that he recover possession of the same; that plaintiff further recover judgment against S. S. Puckett and Never Fail Land Company, as sureties on defendant's replevy bond, the sum of $1,500, the penalty of the replevy bond in this action signed by them as sureties, to be discharged upon the delivery to the plaintiff of the tobacco described or upon the payment of $700, the value of the said tobacco replevied as fixed by the verdict of the jury, and the further payment of the costs of this action, to be taxed by the clerk. It being made to appear that Page Trust Company is the beneficial owner of this judgment, it is ordered that the recovery herein adjudged is for the use and benefit of Page Trust Company."

The defendants, in regard to the judgment at February Term, 1925, in their answer state: "That in drawing the judgment signed, the name of the corporate surety thereon was inadvertently set out as Pine View Farm Company."

Other material facts will be set forth in the opinion.

Marshall T. Spears for plaintiff.
Hoyle & Hoyle for defendants.

CLARKSON, J. This is an injunction proceeding.

In *Hyatt v. DeHart,* 140 N. C., at p. 271, the law as stated: "Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error." *Seip v. Wright,* 173 N. C., 14; *Wentz v. Land Co.,* 193 N. C., 32.

In *Long v. Meares,* 196 N. C., 212-3, speaking to the subject of the principal binding a surety on a replevy bond, the following principle is laid down: "While, of course, it is fully recognized in this jurisdiction that extension of time granted to the principal or other acts which may result in substantial prejudice to the surety will discharge such surety; nevertheless, this principle does not apply to a replevin bond given in a pending suit in conformity with the provisions of the statute. The reason is that, in such cases, sureties on such bonds within the limits of their obligation are considered parties of record, and the defendant, their principal, becomes their duly constituted agent to bind them by compromise or adjustment or in any other manner within the ordinary and reasonable purview and limitation of the action. *McDonald v.*

McBryde, 117 N. C., 125, 23 S. E., 103; *Wallace v. Robinson,* 185 N. C., 530, 117 S. E., 508; *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466." 2 R. C. L., p. 316.

It appears of record, and is not denied by defendants, that the notice to the principal in the judgment in Cole *v.* Cooper was made 29 November, 1926, and the original judgment was modified some twenty-two months after the rendition of said original judgment, and no notice of such motion was given to the plaintiff, Never Fail Land Company, the surety on the replevy bond.

The question presented for our decision: After a final judgment is rendered in an action against a principal and not against the surety on a replevy bond in claim and delivery, at Fall Term, 1925, can notice to the principal, but not to the surety, to modify the judgment made 29 November, 1926, and judgment taken against the principal and surety at December Term, 1926, some twenty-two months after, be binding on the surety? We think not.

Defendants in their brief say: "There can be no question that the judgment of February, 1925, Term, was a final judgment against Cooper until he consented to amend or correct it." This is true as to Cooper, but his agency as to Never Fail Land Company, his surety, was at an end.

C. S., 592, is as follows: "A judgment is either interlocutory or the final determination of the rights of the parties in the action." A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. *Sanders v. May,* 173 N. C., 47; *Simmons v. Dowd,* 77 N. C., at p. 157; *Polson v. Strickland,* 193 N. C., at p. 301.

In *Bunker v. Bunker,* 140 N. C., at p. 24, the following observations are made: "That this was a final judgment there can be no doubt. It possessed all of the elements and characteristics of such a judgment. It decided the case upon its merits, without any reservation for other and future directions of the court, so that it was not necessary to bring the case again before the court; and when it was pronounced, the cause was at an end and no further hearing could be had. *Flemming v. Roberts,* 84 N. C., 532; *McLaurin v. McLaurin,* 106 N. C., 331."

We think that when final judgment was taken at February Term, 1925, in the case of Cole *v.* Cooper, the agency of Cooper as a principal on a replevy bond to bind his surety was at an end. The judgment was a revocation of agency. 1 Freeman on Judgments (5th ed.), at pp. 340-1, states the matter thus: "In view of the broad power of the court to vacate, alter or amend a judgment during the term at which it was rendered, where that power exists notice would seem to be unnecessary to its valid exercise, and it has been so held. On the other hand, it has been frequently said that notice should be given of proceedings initiated after the expiration of the term, even to correct a clerical error or to make the record speak the truth. This is certainly true with respect to an amendment in a matter of substance which changes the rights or liabilities of the adverse party. Such a change in a judgment, whereby it is made to grant relief different from that granted when it was rendered, is absolutely void as against a party having no notice of the application to thus amend it."

Plaintiff is standing on its strict legal rights. It was Cole's misfortune to inadvertently name the surety on the bond as Pine View Farm Company, instead of Never Fail Land Company, which was the surety on the bond. We see nothing in the record that estops plaintiff. The fact that it received the proceeds of the tobacco was nothing inequitable. The record discloses that S. J. Cooper was the subtenant of S. S. Puckett, who was the tenant of the Never Fail Land Company. The referee found "that the said tobacco so seized was raised by the said S. J. Cooper on the said lands so leased during the year 1922; that the said S. J. Cooper is indebted to the said S. S. Puckett, as his landlord, in the sum of $509.91 for rents and advancements for the year 1922; and that the said S. S. Puckett is indebted to the Never Fail Land Company as his landlord, in the sum of approximately $1,600 for rents and advancements for the year 1922."

The landlord's right to the crop to secure payment of rent is not impaired by the subletting of his tenant. The subtenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. *Montague v. Mial,* 89 N. C., 137; *Moore v. Faison,* 97 N. C., 322, 324; *S. v. Crook,* 132 N. C., 1053, 1054. C. S., 2355.

In *Crook's case, supra,* any one aiding or abetting the subtenant in removing the crops from the land before the landlord's lien is paid, is guilty of a misdemeanor. The intent is immaterial. C. S., 2362.

The fact that the Never Fail Land Company did not intervene in the action of Cole *v.* Cooper is no estoppel under the facts disclosed in this case. The principal in a replevy bond may be deemed a statutory agent for the surety, and like any other agent, is bound to exercise the utmost good faith towards his surety; this is common honesty as well as law. In law as in morals "It may be stated that as a principle no servant (the agent) can serve two masters, for either he will hate the one and love the other or else he will hold to the one and despise the other." Luke XVI: 13, 21 R. C. L., at p. 827.

Cooper could have set up the superior lien of the landlord Puckett and the Never Fail Land Company, against the claim of Cole. The chattel mortgage of Cooper said "all my interest," etc. He could not, and did not, give a lien superior to the landlord's. The referee found that Puckett owed the Never Fail Land Company approximately $1,600 for rent and advances. Cooper, under the Landlord Act, although a subtenant of Puckett, was bound for Puckett's rent and advances, which amounted to $1,600. Under all the evidence of record, it shows that the chattel conveyance to Cole, "all my interest," etc., amounted to nothing if the landlord's liens were paid.

The 2,500 pounds of tobacco seized was worth $700, according to the verdict of the jury, and judgment of the court at February Term, 1925. If the Never Fail Land Company got that amount, as found by the referee, it only got a part of what it was entitled to under the law. The law may be hard that the landlord can take the subtenant's crop for the tenant's rent and advances, but it is so written, and has long been the settled law of this jurisdiction.

On all the facts appearing of record, we think the injunction should have been made perpetual. For the reasons given, there is

Error.

W. S. RHODES AND D. G. MATTHEWS, TRADING AS SLADE, RHODES & COMPANY, v. HENRY TANNER, JOE PURVIS, AND HIS WIFE, LUCY PURVIS, JAMES R. PURVIS, ANNIE LEE PURVIS, ERNEST T. PURVIS, BOOKER T. PURVIS, OLLIE V. PURVIS, JOE PURVIS, JR., AND WHEELER MARTIN, GUARDIAN AD LITEM OF THE SIX DEFENDANTS LAST NAMED, WHO ARE MINORS.

(Filed 25 September, 1929.)

1. Appeal and Error G b—Exceptions not discussed in briefs are deemed abandoned on appeal.

Exceptions upon the trial and taken in the record on appeal are abandoned when they are not discussed in appellant's brief. Rule 28.

2. Fraudulent Conveyances A j—In action to set aside deed the innocence of grantees not material when they gave no consideration.

Where a father having a remainder in land after a life estate conveys by deed his interest in the land to his children, and in an action to set aside the deed for fraud against a creditor of the father the jury finds that there was no consideration for the deed, the fact that the children were not of sufficient age to have participated in the fraud is immaterial.

3. Limitation of Actions B b—Registration of deed for over three years does not bar action to set it aside under facts of this case.

The mere fact that a deed sought to be set aside by a creditor for fraud had been registered more than three years next preceding the time of action commenced is not alone sufficient to bar an action by a creditor to set it aside for fraud when the debtor remained in continuous possession as owner and at the time of mortgaging the land to the creditor to secure a note given for the debt the debtor falsely represented that there were no encumbrances on his title, under such circumstances it not being required that the creditor receiving the mortgage search the record in the office of the register of deeds, there being nothing to put an ordinarily prudent man upon inquiry, and the question of imputed notice under the circumstances is for the jury. C. S., 441, sec. 9.

APPEAL by defendants other than Henry Tanner from *Moore, Special Judge,* at April Term, 1929, of MARTIN. No error.

Action to have two certain deeds executed by defendant, Joe Purvis, the first conveying the land described therein to the defendant, Henry Tanner, and the second conveying the same land to the other defendants, the wife and children of Joe Purvis, adjudged null and void, for that both said deeds were executed without consideration, and with the purpose to hinder, delay and defraud the plaintiffs, to whom the said Joe Purvis was indebted at the date of each deed.

The deed to defendant, Henry Tanner, was executed on 4 March, 1920; the deed to the other defendants was executed on 28 March, 1921. Both deeds were duly and promptly recorded. This action was begun against defendants, Henry Tanner and Joe Purvis on 14 May, 1926, against the defendant, Lucy Purvis, on 11 September, 1928, and against the other defendants on 4 December, 1928. Defendants other than Henry Tanner and Joe Purvis were made parties by an order entered while the action was pending.

The issues submitted to the jury were answered as follows:

1. In what amount, if any, was defendant, Joe Purvis, indebted to plaintiffs on 4 March, 1920? Answer: $1,547.57.

2. Was the deed from Joe Purvis and wife to Henry Tanner given for the purpose of delaying, hindering and defrauding plaintiffs in the collection of said debt, as alleged in the complaint? Answer: No.

3. Did the defendant, Henry Tanner, have notice of and participate in such fraudulent intent? Answer: No.

4. Is the action of plaintiffs barred by the statute of limitations? Answer: No.

5. In what amount, if any, was defendant, Joe Purvis, indebted to plaintiffs on 28 March, 1921? Answer: $3,096.89.

6. Was the deed from Joe Purvis to his wife and children given for the purpose of hindering, delaying and defrauding plaintiffs in the collection of said debt? Answer: Yes.

7. Did the defendants, Lucy Purvis and children, have knowledge of and participate in such fraudulent intent? Answer: Yes.

8. Is the action of plaintiffs barred by the statute of limitations? Answer: No.

In accordance with the verdict, judgments were rendered declaring that the deed from Joe Purvis and his wife to defendant, Henry Tanner, is valid, and that the deed from Joe Purvis to defendants, Lucy Purvis and her children, is null and void.

From the last judgment defendants, other than Henry Tanner, appealed to the Supreme Court.

B. A. Critcher and Elbert S. Pell for plaintiffs.
A. R. Dunning and S. J. Everett for defendants.

CONNOR, J. In 1911 the defendant, Joe Purvis, Simon Brown and Bennett Staton purchased a tract of land in Martin County containing about 100 acres. This land was conveyed to them as tenants in common. They paid only a part of the purchase money in cash; they executed their notes for the balance. In 1919, the notes for the balance of the purchase money having been paid, the land was divided among the three tenants in common. Lot No. 3, containing about 33 acres, was allotted to defendant, Joe Purvis, as his share of the land.

Since 1911 the defendant, Joe Purvis, has been a customer of the plaintiffs, who are merchants, engaged in business at Hamilton, in Martin County. Plaintiff knew that the land which defendants, Joe Purvis, Simon Brown and Bennett Staton had purchased in 1911, was conveyed to them as tenants in common, and that the land was divided in 1919. They knew that Lot No. 3 was allotted to Joe Purvis as his share of said land. During the years 1918, 1919 and 1920, plaintiffs made advancements to Joe Purvis to enable him to cultivate the said land. These advancements were secured by liens on the crops grown on said land, and by chattel mortgages executed by Joe Purvis. He failed to pay the amount due for said advancements, and on 4 March, 1920, was indebted to plaintiffs on account of said advancements in the sum of $1,547.57. After said date, further advancements were made by plaintiffs to defendant, Joe Purvis. The total amount due by him to plaintiffs on 28 March, 1921, was $3,096.89. No part of this amount has been paid.

On 30 March, 1921, plaintiffs secured judgments in a court of a justice of the peace of Martin County against Joe Purvis for a portion of his indebtedness to them, to wit, $1,700. On 9 February, 1922, plaintiffs caused executions to be issued on these judgments. While these executions were in the hands of the sheriff, as the result of negotiations between the defendants, Joe Purvis and his wife, Lucy Purvis, and the plaintiffs, the said Joe Purvis and wife executed a deed of trust, by which they conveyed to plaintiffs the land which had been allotted to Joe Purvis, and on which he then resided with his family. This deed of trust secured eight notes executed by Joe Purvis and wife, payable to plaintiffs, aggregating the amount of the indebtedness of Joe Purvis to plaintiffs, to wit, $3,096.89. Plaintiffs accepted these notes in satisfaction of said indebtedness and thereby extended the time for the payment of the same. The deed of trust was duly recorded. During the negotiations which resulted in the acceptance by plaintiffs of said notes, in response to inquiries made by plaintiffs, defendant, Joe Purvis, represented that there was no claim on said land. At the date of said deed of trust, Joe Purvis was in possession of the land conveyed thereby. He has since at all times remained in such possession. Joe Purvis has paid the interest due on said notes for the years 1923 and 1924. He has made no other or further payments on said notes.

On 4 March, 1920, Joe Purvis and his wife, Lucy Purvis, conveyed the land allotted to him in the division among the tenants in common in 1919, to the defendant, Henry Tanner. This deed was duly recorded. Henry Tanner is the father of Lucy Purvis and the father-in-law of Joe Purvis. There was evidence tending to show that at the date of said deed, Joe Purvis was indebted to Henry Tanner for money advanced to him to enable him to pay part of the purchase money for the land, and that the deed was executed to Henry Tanner, conveying the land to him for his life, in payment of the indebtedness, and pursuant to an agreement between the said Joe Purvis and the said Henry Tanner at the time the money was advanced. The jury found from this evidence, under instructions which are free from error, that this deed from Joe Purvis and wife to Henry Tanner was not executed with a fraudulent intent. There was evidence to show that plaintiffs had no actual knowledge of this deed until within three years prior to the commencement of this action. Plaintiffs have not appealed from the judgment on the verdict declaring that this deed is valid. The deed of trust under which plaintiffs claim is therefore subject to the life estate of Henry Tanner in the land conveyed thereby.

On 28 March, 1921, Joe Purvis conveyed the land allotted to him in the division among the tenants in common to the defendants, Lucy Purvis and her children. This deed was duly and promptly recorded. There was evidence tending to show that at the time Henry Tanner advanced the money to Joe Purvis to enable him to pay the purchase money for the land he agreed, upon the demand of Henry Tanner, to convey the land to Henry Tanner for life and at his death to Lucy Purvis and her children, and that when Henry Tanner discovered on or about 28 March, 1921, that Joe Purvis had only conveyed to him, by the deed dated 4 March, 1920, a life estate in said land, and had not conveyed the remainder to his daughter, Lucy Purvis and her children, he demanded that Joe Purvis execute another deed, making such conveyance, and that the deed dated 28 March, 1921, was executed by Joe Purvis in compliance with this demand of Henry Tanner. Defendants relied upon his evidence to sustain their contention that the deed of 28 March, 1921, was for consideration, and was not executed with fraudulent intent, as alleged by plaintiff. These contentions were submitted to the jury under instructions which are in accord with the law as declared in decisions of this Court. *Aman v. Walker,* 165 N. C., 224, 81 S. E., 162. We find no error with respect to the trial of the 5th, 6th or 7th issues which involve the validity of the deed from Joe Purvis to defendants, Lucy Purvis and her children. Exceptions in the record pertinent to these issues are not set out in defendant's brief filed in this Court, nor are these exceptions discussed in the brief. They are therefore taken as abandoned. Rule 28. Defendants rely solely upon exceptions with respect to the 8th issue and contend on their appeal to this Court that plaintiffs' cause of action, having accrued more than three years prior to the commencement of this action against them, is barred by the statute of limitations. C. S., 441.

The deed from Joe Purvis to Lucy Purvis and her children were executed and recorded on 28 March, 1921. The jury has found that this deed was executed with intent to hinder, delay and defraud plaintiffs, who were at its date creditors of Joe Purvis in a large sum, and that the defendants, Lucy Purvis and her children, had knowledge of and participated in such fraudulent intent. If the deed was without consideration, as the jury evidently found, under instruction of the court, the answer to the 7th issue is immaterial. Therefore, the fact that the children of Lucy Purvis were all under the age of nine years, at the date of the execution of the deed to them, and for this reason incapable of participating in the fraud of their father and mother, presents no difficulty. *Aman v. Walker, supra.*

This action, however, was begun as against the defendant, Lucy Purvis, on 11 September, 1928, and as against the other defendants, her children, on 4 December, 1928. More than three years had elapsed from the date and registration of the deed to the date of the commencement of action against these defendants, and if the plaintiffs' cause of action accrued at the date of the fraud, the action is barred. The statute provides, however, that the cause of action "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." C. S., 441, sec. 9. All the evidence was to the effect that plaintiffs did not discover the fraud until some time in 1927. Defendants contend, however, that upon all the evidence it should be held as a matter of law that plaintiffs, by the exercise of reasonable diligence and ordinary business prudence should have discovered the fraud, within three years from the date of the deed, or at least more than three years prior to the commencement of this action, by examining the records in the office of the register of deeds of Martin County, and that therefore the action is barred by the statute of limitations. This contention is presented by their assignment of error based upon their exception to the refusal of their motion for judgment as of nonsuit.

In *Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348, a judgment of nonsuit was affirmed, upon the ground that all the evidence tended to show that the action was barred by the statute of limitations. Plaintiff's contention in that case that she had not failed to exercise reasonable diligence and ordinary business prudence to discover the fraud was not sustained, and it was held that her cause of action accrued more than three years before the commencement of her action. In that case it is said: "The authorities seem to hold, as plaintiff contends, that the three years statute is the law properly applicable to the facts presented. *Tuttle v. Tuttle,* 146 N. C., pp. 484-493; *Hooker v. Worthington,* 134 N. C., 283; *Day v. Day,* 84 N. C., 408; but the position of plaintiff concerning it cannot be sustained, for under authoritative decisions here and elsewhere construing this and similar statutes, it has been very generally held that these words, 'the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud,' etc., by correct interpretation mean until the impeaching facts were known or should have been discovered in the exercise of reasonable business prudence."

It is true that in the instant case the deed from Joe Purvis to his wife, Lucy Purvis, was recorded on 28 March, 1921, and that at this date plaintiffs were creditors of Joe Purvis. Joe Purvis, however, remained in possession of the land conveyed by the deed. There was nothing to put plaintiffs on notice of the fraudulent execution of the deed, or to require them as prudent business men to examine the records, and thus discover that the deed had been made. The deed was on record on 10 February, 1922, when Joe Purvis and his wife executed the deed of trust to plaintiffs; Joe Purvis, however, at the date of the deed of trust represented that there was no claim on the land. He was then in possession of the land, just as he had been since the land was allotted to him in the partition of the tract of land which had been conveyed to him and his cotenants in 1911. It cannot be held as a matter of law that upon the facts appearing from the evidence in this case, plaintiffs failed to exercise reasonable diligence and ordinary business prudence and, therefore, failed to discover the fraud more than three years prior to the date of the commencement of this action. The contentions of the parties with respect to this phase of the case were properly submitted to the jury. *Morrison v. Hartley,* 178 N. C., 618, 101 S. E., 375. The jury found from the evidence, under instructions of the court, that plaintiffs had no actual notice of the fraud until some time within three years prior to the commencement of the action, and that there was no lack of diligence or reasonable business prudence on the part of plaintiffs in failing to discover the fraud at an earlier date. Upon this finding the action was not barred by the statute of limitations.

The judgment is affirmed. There is

No error.

CONCRETE STEEL COMPANY v. W. P. ROSE ET AL.

(Filed 25 September, 1929.)

Appeal and Error J e—Where ruling excepted to does not harm appellant a new trial will not be granted.

A new trial will not be granted on appeal when the action of the trial judge excepted to can by no possibility injure the appellant.

APPEAL by defendant, W. P. Rose, from *Grady, J.*, at April Term, 1929, of WAYNE.

Civil action to recover for steel fabricated by plaintiff and sold to the contractor for use in the construction of the Wilson County courthouse.

It is conceded that the general contractor, W. P. Rose, is liable to the plaintiff for the value of the steel fabricated and used in the construction of said courthouse. The only question in dispute is whether the plaintiff is liable to the contractor on his counterclaim for damages sustained by him on account of a change in the plans, necessitating less steel and more concrete than called for in the original drawings, which change was approved by the supervising architect, F. A. Bishop. The general contractor alleges that he was not notified of the change until it was too late to protect himself from loss. The trial court was of the opinion, and so held, that any claim which the general contractor may have for additional concrete would not be chargeable against the plaintiff, and rendered judgment accordingly.

No cause of action being stated against the other defendants, demurrers interposed by them were sustained.

The defendant, W. P. Rose, appeals, assigning errors.

Langston, Allen & Taylor for plaintiff.
Kenneth C. Royall and W. A. Finch for defendant.

PER CURIAM. Conceding, without deciding, that the judgment may have been irregularly entered, still it appears that the correct result has been reached, and no harm can come from allowing the judgment to stand. Such was the course pursued in *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32. It would seem that as the appealing defendant is not entitled to recover against the plaintiff on his counterclaim, any error committed on the trial was harmless. *Cherry v. Canal Co.,* 140 N. C., 422, 53 S. E., 138. "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." *Butts v. Screws,* 95 N. C., 215.

The action of the trial court in dismissing the counterclaim and awarding judgment in favor of the plaintiff will be upheld.

Affirmed.

J. T. NELSON v. FLORENCE MOORE NELSON.

(Filed 25 September, 1929.)

1. **Appeal and Error J e—Error, if any, in the admission of certain evidence is cured by testimony of objecting party to same effect.**

   Objections to the admission in evidence of the contents of a letter alleged to have been lost upon the ground that a proper search for it had not been made is untenable when the objecting party has testified to the contents thereof on cross-examination.

2. **Divorce D e—Instruction in this action for divorce held not to be at variance with provisions of C. S., 1662.**

   In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of C. S., 1662.

APPEAL by defendant from *Daniels, J.,* at March Term, 1929, of PITT. No error.

W. J. Bundy and Julius Brown for plaintiff.
Harding & Lee and Walter G. Sheppard for defendant.

PER CURIAM. The plaintiff brought suit against the defendant for divorce *a vinculo matrimonii,* alleging that they had been legally married; that the defendant had voluntarily left him; that they had lived separate and apart from each other since May, 1922; that he had continuously resided in the State since the separation, and that he is the injured party. The defendant filed an answer admitting the marriage and separation, denying that the plaintiff is the innocent party, and alleging that the separation was caused by the plaintiff's cruel and inhumane conduct. Issues relating to the marriage, the separation, the plaintiff's residence, and the question of his innocence were answered in favor of the plaintiff. Judgment was rendered dissolving the bonds of matrimony, and the defendant appealed upon error assigned in her exceptions.

The complaint is based upon C. S., 1659, subsection 4, the action having been instituted before the enactment of chapter 6, Public Laws 1929.

The plaintiff was permitted to testify to the contents of a letter, said to have been lost, written him by the defendant to the effect that she "had gone home for good"; and the defendant excepted on the ground that there was no satisfactory evidence that a bona fide and diligent search had been made for the missing paper. Granting for the purpose of the argument, without deciding, that this position is correct, the objection is met by the defendant's admission in her testimony of the specific fact to which the plaintiff bore witness. The defendant said, "I wrote the letter referred to by Mr. Nelson and told him I was gone for good unless there was a change." It is immaterial that this was brought out on her cross-examination; it was not incompetent under the provisions of C. S., 1801.

The charge in reference to an admission of counsel that the evidence was sufficient to justify an affirmative answer to the issues involving marriage, separation, and residence, is not, in our opinion, at variance with the provisions of C. S., 1662. The judge did not direct a finding of the fact, but told the jury that the evidence was sufficient to warrant an affirmative finding. The third issue, which really determined the controversy, was submitted under proper instructions.

No error.

N. R. SKINNER v. C. C. COWARD, J. K. WORTHINGTON AND N. W. CLARK.

(Filed 2 October, 1929.)

1. **Negligence H 1—Subsequent judgment creditor must bring independent action to subject surplus after foreclosure to payment of debt.**

Where the plaintiff has obtained a judgment in the court of a justice of the peace, and has had it recorded in the Superior Court, his remedy to have the surplus after the foreclosure of a prior mortgage subjected to the payment of the judgment is by independent action against the parties interested in the fund, and not by motion in the original cause to make the mortgagee show cause why this should not be done.

2. **Same—Mortgagee is not fixed with notice of subsequent judgment in distributing surplus after foreclosure.**

A mortgagee who has foreclosed his mortgage on lands and has a surplus beyond the mortgage debt is not required to search the record and is not fixed with notice of an existing judgment against the mortgagor duly recorded subsequent to the registration of the mortgage, and after a time he is presumed to have distributed the surplus according to law, and actual notice by the judgment creditor of the existence of the judgment, given seven years after the foreclosure sale, will not fix the mortgagee with liability therefor.

3. **Mortgages H m—Purchaser at foreclosure sale takes title unaffected by judgment against mortgagor docketed after registration of mortgage.**

The purchasers of land at a foreclosure sale of a mortgage thereon acquire title free from the lien of a judgment docketed subsequently to the proper registration of the mortgage.

APPEAL by plaintiff from *Midyette, J.*, at August Term, 1929, of PITT. Affirmed.

The following facts were found by the judge, trial by jury having been waived: On 15 November, 1920, C. C. Coward executed and delivered to N. W. Clark a mortgage on a certain tract of land in Pitt County to secure the payment of $1,000, and on the same day the mortgage was duly registered and indexed. The plaintiff recovered a judgment against the defendant, Coward, for $150, with interest, before a justice of the peace, on 29 January, 1921, and caused the judgment to be docketed in the office of the clerk of the Superior Court on the day it was secured. On the same day, 29 January, 1921, Coward and his wife conveyed the mortgaged land to J. K. Worthington, and inserted in the deed the following clause: "There is a claim against this land for one thousand dollars to N. W. Clark, which the said J. K. Worthington hereby assumes." This deed was registered 19 September, 1921. J. K. Worthington gave Coward a note for $700 and secured it by a mortgage on the land, which was duly recorded. Worthington failed to pay Clark the debt he had assumed, and on 27 December, 1921, the mortgage was foreclosed by a public sale, when J. T. and H. A. Worthington became the purchasers of the land at the price of $1,280. Thereupon Clark, as mortgagee, and the Bank of Craven, as his assignee, made the purchasers a deed dated 10 January, 1922, and registered 4 February, 1922. On 4 May, 1927, a motion purporting to have been made in the case of N. R. Skinner *v.* C. C. Coward was filed in the clerk's office, and a notice was issued to J. K., J. T., and H. A. Worthington to show cause why the land which had been mortgaged to Clark should not be sold to satisfy the plaintiff's judgment. Answering the notice they denied that the judgment was a lien on the land sold under the mortgage and denied that they were responsible for the judgment or under any obligation to pay it. On 8 April, 1929, an amended petition was filed and Clark was notified to appear and show cause why the judgment should not be paid from the surplus remaining after the payment of his claim, which was admitted to be the first lien. The note and mortgage held by Clark had been assigned and transferred to the Bank of Craven and were in its hands when the sale was made under the Clark mortgage. It was contended by the plaintiff and denied by the defendant that there was a surplus of $170, but as to the exact amount there is no finding. Clark entered a special appearance and moved to dismiss on the ground that the plaintiff's relief, if he was entitled to relief, was by an independent action and not by a motion in the cause; and, reserving his rights under the special appearance, denied the plaintiff's right to relief and pleaded the three and the seven-year statute of limitations. The plaintiff alleged that on the day the land was sold under the mortgage he notified Clark of his judgment and of his claim to be paid out of the surplus; but Clark denied this, and there is no finding of fact in reference to the dispute.

Upon these facts Judge Midyette held that the plaintiff had no cause of action against the Worthingtons, and that his remedy against Clark, if he had one, was by an independent action, and that as to Clark the cause was barred by the statute of limitations. The plaintiff excepted and appealed.

S. J. Everett for plaintiff.
F. G. James & Son for J. K. Worthington.
S. O. Worthington for N. W. Clark.

ADAMS, J. It is important to note that the plaintiff seeks relief against all the respondents by a motion made before the clerk, presumably because the judgment recovered before a justice of the peace had been entered on the judgment docket of the Superior Court. The only parties to the judgment were N. R. Skinner as plaintiff and C. C. Coward as defendant. When the plaintiff made his motion he issued a notice to J. K. Worthington, and to Worthington's two sons who had purchased the land at the foreclosure sale, to show cause why the land should not be sold to satisfy the judgment. This notice did not make them parties to the original action. Afterward he issued a notice to N. W. Clark, mortgagee, to show cause why the plaintiff's judgment against Coward should not be paid out of the excess remaining after liquidation of the mortgage debt. The question raised by the appeal is whether the plaintiff is entitled to relief against the respondents or any of them in this proceeding.

First, then, as to Clark: As Coward's mortgagee he was also a trustee for the two-fold purpose of securing payment of the mortgage debt and of accounting for the excess to the mortgagor. *Kornegay v. Spicer,* 76 N. C., 95; *Vick v. Smith,* 83 N. C., 80; *Bobbitt v. Stanton,* 120 N. C., 253. But he assigned and transferred the note and mortgage to the Bank of Craven and the bank thereby became the owner. It became also a trustee. When the sale was made under the terms of the mortgage the deed was executed by Clark and by the bank. There is no finding that the purchase money was paid to Clark. We cannot assume that payment was made to him, because after the assignment he had no pecuniary interest in the proceeds. In the absence of a finding or admission that the money was paid to him we do not perceive how he can be liable to the plaintiff for the excess. But suppose he received the money; he would not be liable to the plaintiff for nonpayment of the excess for the reason that he had neither actual nor constructive knowledge of the plaintiff's judgment. He was under no obligation as mortgagee to examine the records for subsequent encumbrances before paying the surplus to the mortgagor in accordance with the terms of the mortgage. *Norman v. Hallsey,* 132 N. C., 6; *Barrett v. Barnes,* 186 N. C., 154; Jones on Mortgages (7 ed.), sec. 1930. The notice was served on Clark more than seven years after the sale had been made and the deed had been executed to the purchasers; meantime if he received the money he is presumed to have discharged his obligation to pay the surplus to the mortgagor or to the owner of the equity of redemption. 22 C. J., 146, sec. 82. It is therefore contended that the plaintiff's claim against Clark is without merit.

As to the purchasers it is apparent that they were strangers to the plaintiff's judgment; that between him and them no contractual relation existed; and that J. K. Worthington's assumption of the mortgage debt, or his failure to pay it, did not make him liable to the plaintiff as a subsequent judgment creditor. The sale under the first mortgage conveyed title to the purchasers, leaving the plaintiff to seek relief by an appropriate method for subjecting the surplus to the payment of his claim.

But the plaintiff has not chosen the appropriate remedy; he should have sought relief, not by a motion before the clerk, but by an action brought in the Superior Court in which all who were interested in the fund could have been made parties and given an opportunity to be heard. This procedure is discussed and clearly determined and approved in *Norman v. Hallsey, supra.* It is only by an independent action that the points raised in the appellant's brief could finally be settled.

The judgment dismissing the proceeding is

Affirmed.

EDWARD ALSTON v. COUNTY OF WARREN.

(Filed 2 October, 1929.)

Taxation B a—Note secured by title retaining contract of sale of timber is subject to taxation as a solvent credit.

Where the grantors in a timber deed retain title as security for the payment of the purchase price, and the deed provides for payment as the timber is cut and removed and for the execution of notes for the deferred payments which were to be unaffected by failure to cut and remove the timber: *Held*, the notes thus given, being unconditional promises to pay money are solvent credits and subject to taxation under the provisions of chapter 102, Public Laws 1925, chapter 71, Public Laws 1927, providing for the taxation of solvent credits under the authority of our State Constitution, Art. V, sec. 3.

APPEAL by plaintiff from *Barnhill, J.*, at January Term, 1929, of WARREN. Affirmed.

Action to recover sums of money paid by the plaintiff under protest to the defendant, the sheriff of Warren County. These sums of money were paid in discharge of taxes levied upon certain notes owned by plaintiff on 1 May, 1926, and 1 May, 1927. These notes were assessed for taxation, as solvent credits.

Plaintiff alleged that said notes were not solvent credits, and that they were, therefore, not subject to taxation.

From the judgment upon the facts agreed, that plaintiff take nothing by his action, and that he pay the costs to be taxed by the clerk, plaintiff appealed to the Supreme Court.

Murray Allen for plaintiff.

S. G. Daniel & Son, Williams & Banzet and Garland B. Daniel for defendant.

CONNOR, J. The only question presented by this appeal is whether there is error in the judgment rendered by the Superior Court, to which plaintiff duly excepted. This judgment was rendered in accordance with the opinion of the court that upon the facts agreed the notes executed by Adams & Graham, Inc., and owned by the plaintiff, a resident of Warren County, North Carolina, on 1 May, 1926, and 1 May, 1927, were solvent credits, and, therefore, subject to assessment for taxation, under the laws of this State.

The Constitution of this State provides that "laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and, also, all real and personal property, according to its true value in money." Section 3, Article V, Const. of N. C. The General Assembly has from time to time enacted laws in accordance with this provision; such laws were in full force and effect on 1 May, 1926, and 1 May, 1927. Chapter 102, Public Laws 1925; chapter 71, Public Laws 1927. In each of these statutes the word "credits," as used therein, is defined as including "every claim or demand for money, labor, interest or valuable things, due or to become due, including money on deposit." Credits, as thus defined, are subject to assessment for taxation in the township in which the owner resides. It has been held by this Court that solvent credits are property, and like all other property are liable to taxation under our Revenue Laws. *Lilly v. Commissioners,* 69 N. C., 300. A note upon which the maker is personally liable for the payment of a sum of money to the holder, whether the note is due or to become due, or whether it is secured or unsecured, is a solvent credit, and as such is liable to taxation, under the Constitution and laws of this State.

The notes involved in this case were executed by Adams & Graham, Inc., and were owned by the plaintiff on 1 May, 1926, and 1 May, 1927. They were evidences of deferred payments, for which the said Adams & Graham, Inc., were liable to plaintiff, under the terms of a deed by which plaintiff and his sister had conveyed to the said Adams & Graham, Inc., certain timber, on land situate in Warren County, together with the right and privilege to enter upon said land and to cut and remove therefrom the said timber, at any time during a period of eight years from and after 6 March, 1926. The purchase price for the timber and rights and privileges conveyed by the said deed was paid, partly, in cash; it was agreed that the balance should be paid in sums and at dates set out in the deed, and that the deferred payments should be evidenced by notes. The notes owned by plaintiff and assessed for taxation were executed in accordance with this agreement.

The deed contains the following clauses:

"It is the purpose and intent of the parties hereto, and it is expressly understood that the timbers, right and privilege hereby conveyed shall be retained by the parties of the first part to secure and assure the payment of the notes mentioned herein, but the title to the timber cut and manufactured from such timbers shall be released in quantities equal to the payment then made under this contract upon the basis of $10 per thousand feet."

"Failure to cut and remove said timber within the time specified shall not in any way impair the validity of the notes given nor affect the liability of the makers thereof."

The effect of these clauses in the deed, construed in accordance with well settled principles and authoritative decisions of this Court, was, at most, to retain the legal title to the timber, and the rights and privileges described therein, in the grantors, for the sole purpose of securing the payment of the notes executed by the grantee as evidence of its indebtedness to the grantors, and of its obligation to pay the balance due on the purchase price. *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210, 32 A. L. R., 870. The notes, although thus secured, are clearly solvent credits, within the meaning of the statutes and of the Constitution of this State, and as such are liable to assessment for taxation. See *Rampton v. Dobson,* 156 Iowa, 315, 136 N. W., 682, 3 A. L. R., 569. In the instant case the deed is not an option to purchase, or a contract to sell; it is a conveyance of the property described therein, and passed title thereto to the grantee at the date of its execution. The grantee is liable for the payment of the balance due as the purchase price, in all events. The owner of the notes executed as evidences of the deferred payments to be made by the grantee, in accordance with the terms of the deed, has a claim or demand for money, which he may enforce against the maker. The notes are solvent credits, and as such are liable for taxation.

There is no error in the judgment, which is therefore

Affirmed.

GEORGE B. GREENE, COMMISSIONER OF COURT, v. H. STADIEM ET UX.

(Filed 2 October, 1929.)

1. **Evidence A a—Judicial notice will be taken of appointment of special judge.**

   The Supreme Court will take judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of chapter 137, Public Laws 1929.

2. **Controversy without Action A a—Special judge is without jurisdiction to hear controversy when not holding term of court.**

   A special judge is without authority of law to hear and determine at chambers a controversy without action submitted under the provisions of C. S., 626, when the Governor has not specially appointed him under the provisions of statute to hold a term of court at that time, Constitution, Art. IV, sec. 11; Public Laws 1929, ch. 137, and the proceedings of a special judge under such circumstances are a nullity, and on appeal the cause will be dismissed.

APPEAL by defendants from *Cowper, Special Judge,* at Chambers in Kinston, 18 May, 1929. From LENOIR.

Controversy without action, submitted as follows:

"The plaintiff and the defendants, having a question in difference which might be the subject of a civil action, agree upon the following statement containing the facts upon which the controversy depends, and present a submission of the same to the court, as provided in section 626 of the Consolidated Statutes of North Carolina, and do hereby stipulate and agree that G. V. Cowper, judge of the Superior Court of North Carolina, residing in Kinston, may hear this controversy without action at Chambers in Kinston, and render judgment herein."

From the judgment rendered on the facts agreed, the defendants appeal.

Sutton & Greene for plaintiff.
F. E. Wallace for defendants.

STACY, C. J. The Court will take judicial notice of the fact that Hon. G. V. Cowper is one of the Special Judges appointed by the Governor under authority of chapter 137, Public Laws 1929. *Gross v. Wood,* 117 Md., 362, Ann. Cas., 1914A, 30, and note; 15 R. C. L., 1106. It is not suggested that he was designated or commissioned by the Governor to hold a regular or special term of the Superior Court of Lenoir County during the week of 18 May, 1929, when the judgment in the instant case was signed, but the contrary has been made to appear by certificate from the clerk of the Superior Court of said county. Indeed, the judgment on its face purports to have been rendered "at Chambers."

It is provided by Article IV, section 11, of the State Constitution that every judge of the Superior Court shall reside in the district for which he is elected, and shall preside in the courts of the different districts successively, but not in the same district oftener than once in four years, etc.; "and the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold."

Pursuant to this provision of the Constitution the General Assembly of 1929, by general law, chapter 137, authorized the Governor to appoint six Special Judges of the Superior Courts for terms beginning 1 July, 1929, and ending 30 June, 1931, and to issue commissions accordingly.

Section 5 of the said act provides: "That such special judges during the time noted in their commissions shall have all the jurisdiction which is now or may be hereafter lawfully exercised by the regular judges of the Superior Courts in the courts which they are appointed or assigned by the Governor to hold, and shall have power to determine all matters and injunctions, receiverships, motions, habeas corpus proceedings and special proceedings on appeal otherwise properly before them; but writs of injunction, orders to show cause, and other remedial or amendatory writs, orders and notices shall be returnable before them only in the county where the suit, proceeding or other cause is pending unless such judge is then holding the courts of that district, in which case the same may be returnable before him as before the regular judge of the Superior Court; and the same when issued by any such special judge, may always be made returnable by him before the resident or presiding Superior Court judge of each district to the same extent and in the same manner as any Superior Court judge might do in like cases."

Thus it will be seen that under the constitutional provision above mentioned, special or emergency judges are to have the power and authority of regular judges of the Superior Courts "in the courts which they are so appointed to hold." And under the act of their appointment, chapter 137, Public Laws 1929, they are to have all the jurisdiction exercised by regular judges of the Superior Courts "in the courts which they are appointed or assigned by the Governor to hold." It is further provided in said act that such special judges "shall have power to determine all matters . . . otherwise properly before them." But we find no authority for a special or emergency judge to determine a controversy without action at Chambers when he is not holding a term of court. *Dunn v. Taylor,* 186 N. C., 254, 119 S. E., 495. Nor do we apprehend that the Legislature, in excess of its own authority, undertook to clothe special judges with more power than the Constitution permits. If so, to the extent of such excess, the act would be wanting in constitutionality.

It is provided by C. S., 626, that parties to a question in difference which might be the subject of a civil action may agree upon a case containing the facts upon which the question depends, and present a submission of the controversy without action to any court "which would have jurisdiction if an action had been brought." *Drug Co. v. Lenoir,* 160 N. C., 571, 76 S. E., 480.

It follows, therefore, that as the special judge to whom the controversy was submitted, by agreement of the parties, had not been commissioned by the Governor to hold a court in Lenoir County at the time of signing the judgment, he was without authority to determine the matter. Hence the proceeding is a nullity, being *coram non judice,* and the judgment is void.

Dismissed.

STATE v. A. O. SCURLOCK ET AL.

(Filed 2 October, 1929.)

Receiving Stolen Goods D a—In prosecution for receiving stolen goods a verdict that does not find guilty knowledge is fatally defective.

Where under an indictment charging the defendant with receiving stolen goods the verdict does not find guilty knowledge of the defendant at the time of receiving them it is fatally defective, and upon application for *certiorari* when this defect is made to appear a *venire de novo* will be ordered.

APPLICATION by A. O. Scurlock for *certiorari* to review record in case of *S. v. Scurlock et al.*, tried at the September Term, 1928, of RANDOLPH.

It appears from the application and record that Charles Faircloth, Edgar Barbee, J. W. Garvin and Osley O. Scurlock were tried upon an indictment charging them (1) with the larceny of a Chevrolet roadster, valued at $564.00, the property of Johnson Chevrolet Company, and (2) with receiving said Chevrolet roadster, valued at $564.00, the property of Johnson Chevrolet Company, knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: "Not guilty as to John Garvin. Verdict as to Charlie Faircloth, E. B. Barbee and Odell Scurlock, guilty of having car in their possession, knowing it to be stolen."

Judgment: Imprisonment in the State's prison as to each of the defendants convicted for not less than five nor more than ten years at hard labor.

The defendants and each of them gave notice of appeal to the Supreme Court. E. B. Barbee alone perfected his appeal, *ante,* 248, though petitioner was under the impression that his appeal would be considered along with his codefendant's, as his counsel had so advised him.

Writ of *certiorari* ordered to issue.

Walter E. Brock for petitioner.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. The petitioner's application for writ of *certiorari,* in lieu of an appeal, has been allowed in the instant case because it appeared on the face of the record proper in Barbee's appeal, *ante,* 248, that the verdict as rendered was not responsive to the indictment, did not convict the defendants of a crime and was not sufficient to support a judgment. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621.

The verdict fails to find that the defendants *received* the car in question, knowing at the time that the same had been feloniously stolen or taken. *S. v. Caveness,* 78 N. C., 484.

It is conceded by the Assistant Attorney-General, Mr. Nash, that the petitioner is entitled to a *venire de novo.* It is so ordered.

Venire de novo.

KNOTT WAREHOUSE COMPANY, J. T. HARRIS AND WIFE, AND R. E. BELCHER AND WIFE, v. W. R. WILLIS, TRUSTEE, AND CITIZENS BANK.

(Filed 2 October, 1929.)

1. **Assistance, Writ of B a—Issuance of writ held proper in this case.**

   Where land has been sold by commissioners in foreclosure proceedings under a decree of court, and the sale duly confirmed, upon possession being withheld from the purchaser at the sale it is proper for the court in its equitable jurisdiction to order a writ of assistance to evict the wrongful possessor and to place the purchaser in possession of the lands.

2. **Appeal and Error J a—Judgment authorizing writ of assistance is presumed correct on appeal—Pleadings.**

   Where the respondents in their answer to a petition for a writ of assistance allege that the petitioner has caused a subdivision of the property so as to convey land not described in the deed of trust under which the petitioner seeks his relief, and the allegations in respect thereto are not denied by the petitioner: *Held,* the allegations have reference to matters of defense which do not require denial, and on appeal when there is no finding in the record in regard thereto and no exception to the refusal of the court to make such finding, it is presumed that the judgment authorizing the issuance of the writ is correct and that the petitioner acquired only the land described in the deed of trust, in the judgment of the court, and in the commissioner's deed, and the judgment will be upheld.

APPEAL by R. E. Belcher and wife from a judgment of *Lyon, Emergency Judge,* at April-May Special Term, 1929, of PITT, authorizing a writ of assistance in behalf of Pitt County Insurance and Realty Company, purchaser of land at a judicial sale. Affirmed.

R. T. Martin for appellants.
John Hill Paylor and Albion Dunn for petitioner, appellee.

ADAMS, J. The facts are set forth in the judgment. On 23 January, 1922, R. E. Belcher and Lucy Belcher, his wife, executed to W. R.

Willis, as trustee, a deed of trust conveying real property described as follows: "The following lands, lying between Barrett and George streets on a certain map made by Harding and Rivers, known as subdivision of the Belcher property at Farmville, North Carolina, dated April, 1928, and being lots Nos. 4, 5, 6, 7, 8, and 9." In 1925 the trust was foreclosed and the property was sold to the petitioner, the Pitt County Insurance and Realty Company, at the price of twelve hundred dollars. The commissioners who had made the sale under a decree in equity, submitted their report recommending that the sale be confirmed. Thereafter the sale was confirmed, and the commissioners were authorized and directed to convey to the petitioner the specific property described in the deed of trust. They complied with this order on 20 July, 1925, the land conveyed being the lots described in the deed of trust and in the decree of foreclosure. The appellants refused to give the petitioner possession.

Upon consideration of the foregoing facts it was adjudged that the petitioner is the owner and entitled to the possession of lots 4, 5, 6, 7, 8 and 9, as they appear on the map referred to in the deed of trust, and that a writ of assistance be issued directing the sheriff to evict the appellants and to put the petitioner in possession of the property.

A writ of assistance is a form of process issued by a court of equity to transfer the possession of lands, the title or right of possession to which it has previously adjudicated, as a means of enforcing its decree. *Bank v. Leverette,* 187 N. C., 743; *Lee v. Thornton,* 176 N. C., 208; *Knight v. Houghtalling,* 94 N. C., 408. These and similar decisions sustain the judgment upon the facts found by the presiding judge.

In their answer to the petition the appellants allege that the map referred to was not in existence when the deed of trust was executed, and that the petitioner has caused a subdivision of the property so as to convey the land not described in the deed of trust; and in their brief they take the position, as we understand, that as their allegations are not denied they must be taken to be true. The allegations, however, are matters of defense which are deemed to be denied; and in the record there is no finding in reference to them and no exception to the court's refusal to find any facts relating to them. The only land acquired by the purchaser is that which is described in the deed of trust, in the judgment of the court, and in the deed of the commissioners. Judgment

Affirmed.

STATE v. ERNEST FOX.

(Filed 2 October, 1929.)

1. **Homicide G a—Evidence of defendant's guilt of murder in first degree held sufficient to be submitted to jury in this case.**

   Circumstantial evidence of the prisoner's guilt of murder in the first degree is held under the facts of this case sufficient to be submitted to the jury.

2. **Criminal Law G d—In this case held: testimony as to telegram sent by defendant tending to show his uneasiness was competent.**

   Testimony of a witness as to the contents of a telegram sent by the defendant while in the presence of the witness who heard the defendant narrate it to the telegraph operator and saw the operator write it down, which tended to show the defendant's anxiety as to the knowledge of another of "something on" him, is admissible with other circumstantial evidence of defendant's guilt of murder, as a circumstance tending to show guilt, the probative force being for the jury.

3. **Criminal Law G i—Expert testimony as to the position of the deceased when shot held admissible under the facts of this case.**

   When the position of the deceased when killed is relevant to the inquiry it is competent for a physician who had examined the deceased and who has qualified as an expert, to testify that the killing was done with a 44 bullet while the deceased was lying down and explain the facts and circumstances upon which he based his opinion, and such testimony does not violate the rule that the issue of the defendant's guilt is exclusively for the determination of the jury.

4. **Criminal Law G l—Where a prior confession is inadmissible a subsequent confession made without fear or hope may be admissible.**

   Where the confession of the defendant of his guilt of murder, made to an officer of the law, is excluded by the judge upon a *voire dire* on the ground that it was induced by fear or favor and therefore not voluntary, a later confession, made to another witness, is admissible when the judge finds upon sufficient evidence upon *voire dire* that it was not influenced by the causes which had induced the previous confession and that it was free and voluntary, and made without fear or favor.

APPEAL by defendant from *Small, J.*, and a jury, at June Term, 1929, of EDGECOMBE. No error.

The defendant was indicted for murder of one Jesse Taylor and convicted of murder in the first degree and sentenced to be electrocuted. The State's evidence tended to prove that Jesse Taylor was a young man about 20 years of age and was engaged in the grocery business in Rocky Mount, on East Grand Avenue. That on Saturday night Jesse Taylor was in the store a little after 12 o'clock checking up and counting his money. Jesse Taylor was a single man and customarily slept in his place of business, his father and family resided in another section of the city, some distance from the store. On the next morning, Sunday, 26 May, the members of the family telephoned the store and received no response, one of his brothers went to the store, and after knocking and hollering, with no response, the brother with others forced an entrance by breaking the door of the store, which was locked on the inside. They found Jesse Taylor on a cot dead, with blood on his head. The two brothers and the father of Jesse Taylor identified a 41 caliber Colt revolver as the property of J. H. Taylor, father of Jesse Taylor, which he had loaned to Jesse Taylor, his son, with instructions by the father to keep same in his store. Neither his father nor brother was able to place the said Jesse Taylor in the possession of the revolver they identified inside of two weeks prior to the time of Jesse Taylor's death. The father, brothers nor did any State's witness see defendant enter or leave the store either on Saturday, 25 May or Sunday, 26 May.

Louis Perry's testimony was to the effect that he had known defendant three or four years, and knew where his father lived on 26 May. He saw defendant Thursday, 23 May, at Jesse Taylor's store at an early hour, about five minutes of six o'clock. That Jesse Taylor and two white men and defendant Fox were in the store and were so dressed as to indicate that they had slept in Jesse Taylor's store the night before.

E. A. Pittman: Knew Jesse Taylor; he ran a store on East Grand Avenue, No. 600, and rented the store next door to him, No. 602, to Taylor, and then Taylor moved across the street to another building. "The night before Jesse Taylor was killed, Saturday night, Ernest Fox, the defendant, entered my store at about eleven-thirty p.m., and stayed there until I cleaned up and begun to close up. It was a quarter to one when I got cleaned up and closed. While Fox was in the store he just sat at the window in the corner of the building, looking out the window, and didn't have anything to say. The window he was sitting at was on the street side—the west side of the street looking west. There is nothing on the other side but the store where Jesse Taylor kept. Fox was employed at one time by Jesse Taylor. He stopped work about three weeks before Jesse Taylor's death. I saw another delivery boy working for Mr. Taylor afterwards. On the morning of 26 May, I opened my place of business, as near as I can get at, about seven o'clock. Jesse Taylor's body was found about ten o'clock. I went over. The body was lying with the head to one side, and I saw blood here and here (indicating), and I went right back."

Clarence Taylor testified: "I identified this book on yesterday as my brother's bank book. I know my brother's handwriting. Yes, that is his handwriting and his figures. I found that deposit slip on Sunday morning that my brother was found dead in the store on the counter near the cash register. I forget what day we found the book, but it was found in the desk where the money bag was. I saw my brother make out the deposit slip that Saturday night before he was found dead Sunday morning. (State offers in evidence the deposit slip and bank book and the pistol and two bullets about which Dr. Large testified.) I saw my brother checking up Saturday night, but didn't know how much he had until I seen the deposit slip. I never saw that before Sunday morning. I was looking at my brother when he made out the slip and put it in the bank book. I was three or four feet from him. I do not know the exact figures. I found it a little after ten o'clock Sunday morning. I left the store Saturday night around one or one-fifteen. He put the money in the bank book in a bag and tied it up. I don't know what my brother did in respect to the slip after I left. I know what the slip called for. I didn't count the money and couldn't tell you. That is the bag. He had a key ring on his belt and the door key was on there, but what was on the other keys I don't know. I never saw them but one time. I have made a search in the store for them, but have been unable to find them. (State offers in evidence the bag.) I found the bag in the desk Wednesday morning, I believe."

George Planter: That he lived on Atlantic Avenue in Rocky Mount and made hogsheads. He identified the 41 caliber Colt revolver—the gun previously identified by the father and two brothers of Jesse Taylor which the father had loaned Jesse Taylor; that defendant came to his house Sunday morning before last between 3 and 4 o'clock and knocked on the door; he was in bed. After some conversation, he pulled out the revolver and handed it to him and said keep it until he called for it. Later on the same morning he tried to buy the pistol on credit from Fox. The revolver had five bullets in it and six chambers, but there was no empty shell in it. Defendant did not tell where he got it or why he wanted him to keep it. The first time he came in a Hudson car like Ben Johnson drives; the second time in an open Ford.

Ben Johnson: "Was taxi driver and lived in Rocky Mount. Had known defendant two or three years. He was parked on the morning of 26 May at Douglass Drug Store. Fox said he wanted him to take him home. He carried defendant to various places, one Frank Williams accompanying the defendant: (1) To defendant's home on Pennsylvania Avenue; (2) about five minutes afterwards to George Planters; (3) to Easter Ricks' house; (4) to Wimberly's Pressing Club; (5) to Myrtle Avenue; (6) to Rosa B. Ellis' house, then to Douglass Drug Store, and he and Williams got out. That was about 3:30 o'clock. Fox, when he went to the Pressing Club, got some dresses and carried them to Rosa B. Ellis'. He did not know Planter and heard no conversation between them. He was paid $1.05 for the trip."

John Jones: "Lived in Rocky Mount and worked for the Dodge people. He knew defendant, and on Saturday morning, 25 May, defendant came by and wanted to buy an old automobile from him. He for several months was after him to buy an old car. I told him there was an old Ford he could have for $20. He looked at it and liked it, and said he would come after it when he got the money. Told him he had better hurry, as he could not have it unless he came by 6:30 that evening. At ten minutes to six he came back and said he didn't have the money, but expected to get it pretty soon. Next morning about 5:30 he came to witness' house and awoke him and everybody else in his house, and asked if he could get the car that morning. Witness said he thought so, and asked him if he had the money, and he said 'Yes,' and pulled out two ten dollar bills—$20.00. They went over to the foreman's, and he told them he would get down at the place of business about 8 o'clock, and that defendant could get the car. In going to the foreman's defendant went by the police station and through the public streets of Rocky Mount, where he could be seen by both white and colored, and the officers of the law. He did not seem excited, nor did he try to hide or conceal himself. Defendant had a little liquor in his pocket when he came to me that morning, and I told him he had better throw it away because my Boss didn't like liquor, and I didn't want him to see any around. When he came to my house at five-thirty he didn't look like he had drunk a drop."

Clarence Griffin: "Drove a transfer in Rocky Mount. About seven o'clock, 26 May, in front of Dunbar's Cafe, defendant hired witness to take him across town to Rosa B. Ellis' house. He stayed there about five minutes, and he brought him back to the transfer shed and put him off at Burnette's Drug Store. He paid him 75 cents, and that was all the money he saw him have; went through the heart of Rocky Mount, colored section, and could be seen by them. Went in public places, and defendant acted perfectly natural; didn't seem in a hurry or scared. He was not flourishing money around like a man that had plenty of it."

Alexander Grant: "Lived in Rocky Mount, and had known defendant three or four years. Met defendant Sunday morning, 26 May, at Douglass' Drug Store, and had just come out of Dunbar's Cafe and had a lunch wrapped up. Drove up and asked me if I wanted to go to Wilson. Told him yes, but I had no money, and defendant said he would take care of that part. He and another colored boy went in the Ford that defendant told him he had bought that morning for $20.00. Left Rocky Mount ten minutes to eleven o'clock. Before they left Rocky Mount defendant showed him and the boy $7.00; before they got to Sharpsburg defendant showed them $55.00; said he got the money from his mother, who had sold some Liberty bonds. Said he was going to his aunt's to get some money left him by a relative, and he had just come of age and could get it. Stopped at Sharpsburg on the way to Wilson. Went to Stantonsburg and Paul Chapel, where defendant's aunt lived. They went to service. Left the chapel about 4:30 p.m., and went to Snow Hill. Returned to Wilson at 7:30; ate supper in a cafe. After supper defendant called up Rosa B. (Ellis) over phone at Rocky Mount. That Fox afterwards told witness that the girl said, 'I know something on you,' and that Fox asked her to meet him at Elm City; that they went to Elm City, but that Rosa B. did not meet them; that they stayed in Wilson that night; that they were having constant car trouble. They stayed that night in a hotel. That on Monday morning they decided to go to Greenville. On the way to Greenville they stopped in Farmville. At Farmville they parked the car near a telegraph office, and that witness sent a telegram to his mother at Rocky Mount; that the other party sent another telegram to some one in Rocky Mount; that Ernest Fox sent a telegram to Rosa B. at Rocky Mount. 'I seen the man write it.' (Question) What did he say to her? (Defendant objects.)

By the Court: Did you hear Fox tell the man what to say in the telegram? Answer: Yes, sir.

Q. Was that in the telegram what Fox said? Answer: He said 'I like to know what you are talking about,' and said to wire him back in care Greenville Western Union. This was about eleven o'clock Monday morning. We then struck out for Greenville. We drove around town, and he got out and parked his car about a block from the Western Union, and went to the Western Union to see if the telegram came. It was twenty minutes to twelve o'clock then, and the telegram hadn't come. He had a suit pressed. Witness then proceeds to tell Fox's movements around Greenville, and about the witness and the witness' companion, aside from Fox, spending Monday night in an automobile in Greenville. The next time we saw him he was under arrest in Greenville. That was the next morning—Tuesday."

Dr. H. Lee Large was admitted to be a medical expert. He examined the body of Jesse Taylor on the Sunday morning near eleven o'clock. "The body was on a cot in the northwest corner of the store building. The body was lying on the cot on the right side. He had a bullet wound which entered on the left side or under the left side of his jaw, barely missed the jaw-bone; ran slightly backward and across to enter the base of the skull between the ears. (The witness is here qualified and the court finds as a fact that the witness is an expert in judging the caliber of a pistol and the size of a pistol ball.)

Question: Have you an opinion satisfactory to yourself on this question, as to whether or not Jesse Taylor, the wound which was found in his neck, was inflicted while he was lying or standing up? (Defendant objects; objection overruled, and defendant excepts.) Answer: Yes, sir, my opinion is that he was lying down.

Question: I ask you to explain so far as you can why you say that? (Defendant objects; objection overruled, and defendant excepts.) Answer: First the range of the bullet from its point of entry to its final point of lodging in the head of this man was such that would have made it impossible for a man to have been in a standing position when the shot was fired; and, secondly, the condition of the body was such as to indicate that the body, in other words, this man had never made any voluntary movement from the time the shot was fired, and it is borne out by the wound. The wound was such as would have caused immediate paralysis of the body, after the bullet was fired. There was no other wound on his body."

Dr. Large further produced the bullet taken from Jesse Taylor's body and testified it was in three pieces and was a 41 caliber bullet.

Witnesses *P. C. Zimmerman* and *R. O. Watson,* police officer, of Rocky Mount and deputy sheriff, respectively, were examined as witnesses for the State. When interrogated relative to an alleged confession of the defendant, the defendant objected; whereupon, said witnesses were examined in the absence of the jury with a view of determining the competency of their testimony relative to said confession. Upon the evidence elicited, in the absence of the jury, the court found as facts: That the statements alleged to have been made by the defendant, both written and oral, in the nature of a confession, were induced either by fear or hope, and that such statements as so alleged to have been made by the defendant were not voluntary in their nature. Upon such findings by his Honor, upon motion of defendant, the evidence of witnesses Zimmerman and Watson, relating to the alleged confessions, were excluded.

In the absence of the jury, the following witnesses were examined: George T. Sugg, defendant Ernest Fox, R. O. Watson, S. P. Marler, to determine the competency or incompetency of the witness George T. Sugg.

Upon the conclusion of the evidence the court below found that as a fact the statement made by the witness George T. Sugg, while said witnesses were inspecting the jail along with other grand jurors, was a voluntary statement and rules the same admissible in evidence. (Defendant objects; overruled; defendant excepts.)

In the presence of the jury:

George Sugg: "I was a member of the grand jury during the present six months. I came on the first of January and go through the year. I went to the jail on Monday afternoon and made an inspection. I saw this fellow here, but I didn't know who he was. *I asked him what he was doing in there and what he was in there for, and he told he was in there* *for killing a man, and I said, 'For what?' and he said, 'For his money.' I asked him had he been in trouble before, and he said two or three times. I didn't ask him anything else. I did not put him in any fear to tell. I did not know who he was when I asked him that; I did not know that he was the man that was alleged to have killed Jesse Taylor.* I had been upstairs. I went into all the rooms. All of the grand jury came in the cell where Ernest Fox was confined, that could get in at one time. I am not sure about that, though. Some of the grand jury were ahead of us; we were going all over the house. I don't remember who was with me at the time of the conversation. There were eight or ten or twelve people in there. We did not communicate to Ernest Fox what we were in there for. I did not have any idea that this was the man that was accused of the Rocky Mount murder. *That's what he said, 'For killing a man,' and I said 'For what?' and he said, 'His money.'* I asked other prisoners in the jail what they were in there for, some white and some colored. I knew nothing about the previous conversations other people had with Ernest Fox. I had never seen him before that day. We were in there about four o'clock. That was all he said to me. I don't remember when I first told what transpired between us. I haven't told an officer, because I left here and went home. I did not communicate this conversation to any officer. The sheriff served subpœna on me this morning."

P. C. Zimmerman's testimony was a narrative of a conversation he had with defendant as to his whereabouts on the night of the killing. About 12 o'clock defendant and Frank Williams had purchased a half gallon of whiskey for $2.50 from Dancy Ward on Langley Road the other side of the A. C. L. Company's pump station. He paid $1.75, Williams the balance, and they came to town to the Douglass Building, went in Wimberly's Pressing Club, got some clothes, and Ben Johnson took him home at 2 o'clock Sunday morning, and was there until 6 o'clock and went to Douglass Building; went about 9:45 to Wilson. He then narrated where defendant told him he went. "I asked him what he paid for the car and he said $20.00. I asked him where he got the money to buy the car and he said he won it gambling, and I asked him where, and he said 'Langley Road in a tobacco barn.' I asked him how much money he had when he bought the car, and he said $43, and I asked him how much he had when he entered the game, and he said $8.00; and I asked him how much he won, and he hesitated and I said, 'Did you win $35.00?' and he said 'Yes.' And I asked him how much money did he have in his pocket after he bought that automobile, and he said '$43.00,' and then I asked him where did he get the money to buy the car, and he said Jim Whitley gave him $4.00, his brother, Harvey Fox, Jr., who is just a small fellow, gave him $8.00, and he said he had $8.00 at the house he had saved for the purpose of buying a car. I then asked him if he had any more money from Sunday morning until the time he was arrested except the $43.00 in question, and he said 'No,' that was all he had. . . . I asked him where he was at 12 o'clock and he said at Dancy Ward's buying whiskey. I asked him where he was at 1:30, and he said 'In a tobacco barn, Langley Road, gambling.' I asked him who was in the game, and he said 'Nathan Speight and Charles Woodard and four others.' I asked him where he was at 2:15, and he said 'In the tobacco barn gambling.' I asked him where he was at 3:30, and he said he was still in the tobacco barn gambling. I asked him where he was at 5 o'clock, and he said he was at home. I asked him what time he got up, and he said about 6 o'clock. I then asked him if he knew Jesse Taylor, and he said he did, and I asked him did he ever work for him and he said he did. I asked him how long, and he said three weeks. I asked him did he ever see Jesse's gun, and he said he did before he moved from Pittman's store to the place where he died. I asked him if he had ever spent the night in the store with Jesse Taylor on a pallet on the floor, and he said he absolutely had not; that he had never spent a night in there. There were some more questions, but I can't recall them right now."

The defendant introduced no evidence.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

George M. Fountain and T. T. Thorne for defendant.

CLARKSON, J. The evidence, from the record, is sufficient, with or without the confession of defendant, to be submitted to the jury to sustain a verdict of murder in the first degree. *S. v. Miller, ante,* 445.

The defendant excepts and assigns error to his Honor's permitting the witness Grant to testify as to the contents of the telegram sent by defendant Fox to Rosa B. Ellis. The witness, however, was standing by and heard what Fox said. Not only this, but he saw the man write down on the blank what Fox said: "I seen the man write it." He said, "I like to know what you are talking about," and to wire him care of Greenville Western Union. It was no doubt introduced as some evidence to show Fox's anxiety as to what Rosa B. Ellis meant when she told him over the telephone that "I know something on you." This was admissible for what it was worth—the probative force was for the jury.

The defendant further excepts and assigns error: That it was incompetent "to permit State's witness, Dr. Large, to testify that the deceased, Jesse Taylor, was, in his opinion, lying down when he received the fatal wound, and to further testify as to his reasons, as it invades the province of the jury." We cannot so hold.

In *S. v. Jones,* 68 N. C., at p. 444, it is said: "The only point made was as to the competency of the opinion of the physician who was examined for the State, as to the cause of death of the deceased, and of his posture and position at the time he was shot. It was not denied that the opinion was competent as to the cause of death, but it was insisted that it was incompetent as to the posture and position. We suppose an expert might express an opinion of the posture and position from the range of the shot, and other circumstances."

In *McManus v. R. R.,* 174 N. C., at p. 737, the following observations are made: "It was also urged for error that Dr. McCoy, a witness for plaintiff, who had made a professional examination of the intestate at the time, was allowed, over defendant's objection, to testify that 'from the nature, condition and position of the wounds, he was of opinion that the intestate was lying down at the time the same was inflicted.' It will be noted that this witness, admitted to be an expert, spoke from a professional and personal examination of the intestate, and the answer, to our minds, was clearly within the domain of expert opinion. Both question and answer are approved and upheld, we think, in *Ferebee v. R. R.,* 167 N. C., 290; *Parrish v. R. R.,* 146 N. C., 125; *S. v. Jones,* 68 N. C., 443." *Shaw v. Handle Co.,* 188 N. C., 222; *Butler v. Fertilizer Works,* 195 N. C., 409; *Street v. Coal Co.,* 196 N. C., 178; see *S. v. Carr,* 196 N. C., 129.

The most serious contention of defendant was the admission of the testimony of Grand Juror Sugg, who visited the jail for the purpose of inspection. The defendant's confessions to the officers, made prior to that time, were ruled out on the ground that defendant was induced to make them from fear or hope. The court below, on the *voir dire,* found that they "were induced either by fear or hope, and that such statements as so alleged to have been made by defendant were not voluntary in their nature." These confessions to the officers were, from the findings of the court, properly excluded, and the court below gave the rule that is followed in all civilized nations.

In *S. v. Roberts,* 12 N. C., at pp. 261-2 (1 Dev., 259), relied on by defendant, the law is thus stated by *Henderson, J.:* "Confessions are either voluntary or involuntary. They are called voluntary, when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man, cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear, are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected. It seems to be admitted in this case, that the confessions first made, were of that character, and were therefore rejected; but that being repeated to the same person some time afterwards, they lost their original character, assuming that of free and voluntary ones, and became evidence of the truth. But for what reason I am at a loss to conceive. How or whence does it appear, that the motives which induced the first confession had ceased to operate when it was repeated? It is not incumbent on the prisoner to show that they resulted from the same motives. It is presumed that they did, and evidence of the most irrefragable kind should be produced to show that they did not. It is sufficient that they may proceed from the same cause (4 Starkie, 49)."

In *S. v. Fisher,* 51 N. C., p. 478, *Battle, J.,* shows that the reference made by *Henderson, J.,* to Starkie, was from Ed. 1824, p. 49. The learned judge says that "In a subsequent edition (that of 1842, p. 36), Starkie somewhat modifies the rule, and says, 'where a confession has once been induced by such means, all subsequent admissions of the same, or like facts must be rejected if they have resulted from the same influence.'" *S. v. George,* 50 N. C., 233; *S. v. Lowhorne,* 66 N. C., 638; *S. v. Ellis,* 97 N. C., 447; *S. v. Harrison,* 115 N. C., 706; *S. v. Winston,* 116 N. C., 990; *S. v. Rodman,* 188 N. C., 720; *S. v. Whitener,* 191 N. C., 659; 7 A. L. R., 420; *S. v. Newsome,* 195 N. C., 552.

In *S. v. Lowhorne, supra,* at p. 640, we find: "It is true, that in the case of *S. v. Roberts* (1 Dev., 259), the confession was made to the same person, but that, we think, can make no difference."

In *S. v. Drake,* 113 N. C., at p. 628, *Burwell, J.,* in regard to confessions, said: "It is a well settled rule that if promises or threats have been used, it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary, and therefore admissible. And hence, it having been found that an improper influence was used to obtain the confession that was excluded, and it not having been made to appear that that influence had been in any way removed, the confession made on the journey to jail to one of the crown should also have been excluded. *S. v. Drake,* 82 N. C., 592." *S. v. Page,* 127 N. C., 512; *S. v. Bohanon,* 142 N. C., 695; *S. v. Whitener, supra.*

"Confessions are to be taken as prima facie voluntary and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary." *S. v. Sanders,* 84 N. C., at p. 730; *S. v. Rodman, supra.*

This Court, through *Dillard, J.,* speaking to the subject in *S. v. Sanders, supra* (84 N. C.), at p. 730, said: "Under the objection made, the admissibility of the confession depended on the facts accompanying it and the legal inference therefrom, the facts being matter for the decision of the judge and conclusive, and the sufficiency or insufficiency thereof to warrant the admission or exclusion of the evidence being matter of law reviewable in this Court. *S. v. Andrew,* Phil. (61 N. C.), 205;

S. v. Whitfield, 70 N. C., 356. If from the facts the legal inference be that the confession was voluntary, then the evidence was receivable, otherwise, not." *S. v. Whitener, supra; Smith v. Kron,* 96 N. C., at p. 396.

The confessions made to the officers having been ruled out as incompetent, induced either by hope or fear, it must be made to appear that that influence has been done away with or removed before subsequent confessions can be deemed voluntary and therefore admissible. When objection is made, the competency or incompetency must be heard on the *voir dire.* "*Voir dire*—to speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to." Black's Law Dic., p. 1212.

The court below on the *voire dire* heard all the evidence introduced, including that of defendant, and found that the statement made to the grand juror was voluntary and admissible in evidence. There was evidence to sustain this ruling, therefore the testimony of the grand juror was properly admitted as evidence, in this we can see no error. From the whole record we can find

No error.

LEON WEST, MINOR, BY HIS NEXT FRIEND, ED WEST, v. W. B. MURPHY.

(Filed 2 October, 1929.)

1. **Wills E b—Devise to B. so long as she should live and if no children then to C. gives a child of B. a remainder after B.'s life estate.**

   Where the owner of the fee devises his land to his granddaughter so long as she should live, and if no children, then to her brother by name, the granddaughter being but a child at the date of the will: *Held,* upon the granddaughter dying leaving her surviving a child, the child takes a remainder in the lands by implication as purchaser under the will, the granddaughter having but a life estate, and her brother taking no interest in the land, the contingency upon which his estate was to be divested having happened. C. S., 1737.

2. **Wills F b—A remainderman by purchase under a will is not estopped by deed of the life tenant and contingent remainderman.**

   Where the interest of a contingent remainderman under a will has been divested by the happening of the contingency, the remainderman who takes the lands by purchase under the will is not estopped by a deed of the life tenant and the contingent remainderman from setting up his title as against the grantee therein.

3. **Wills E a—General rules for the construction of wills.**

   In construing a will effect will be given to the intention of the testator as gathered from the written instrument unless in contravention of some rule of law, and wherever possible effect will be given to every clause and every word, and a devise of real property will be construed as a devise in fee simple unless the will or some part of it shows an intent to convey an estate of less dignity, C. S., 4162.

4. **Same—Presumption against intestacy.**

In construing a will there is a presumption against intestacy.

5. **Same—An estate under a will may be created by implication.**

By will an estate may pass by mere implication from the language used, without any express words to direct its course, but the implication must be necessary, or highly probable, and not merely possible.

APPEAL by defendant from a judgment of *Daniels, J.,* given upon an agreed statement of facts, heard at Chambers by consent of parties. From GREENE. Affirmed.

Bryant Mooring, a resident of Greene County, died 28 March, 1911, leaving a will which was duly admitted to probate. Item 5 is as follows: "I give and bequeath and devise to my granddaughter, Bertie Hill, the following piece or parcel of land bounded and described as follows: 'Beginning at a stake ...., containing 20 acres, more or less, and being known as lot number three in a plat made by R. E. Beaman for Bryant Mooring, dated 3 May, 1904, to her so long as she should live, and if no children, then to her brother, Frank Hill." Bryant Mooring was seized in fee of this property at the time of his death.

Bertie Hill, after her marriage with Ed West, died on 27 June, 1923, leaving Leon West, the plaintiff, surviving her as her only child and heir at law. On 7 June, 1920, after the birth of the plaintiff, Bertie West, joined by her husband, and her brother, Frank Hill, executed a deed purporting to convey to W. B. Murphy, the property described in item five of the will of Bryant Mooring, which is duly recorded in the registry of Greene County. The defendant has been in possession of the lot in controversy since the day this deed was executed. The plaintiff brought suit to recover the land on 17 November, 1923.

It was adjudged upon the agreed facts that Bertie Hill took an estate for life in the devised lot, and that upon her death the plaintiff, her only son and heir at law, became the owner of the fee in remainder. The defendant excepted to the judgment and appealed.

Teague & Dees and J. Faison Thomson for plaintiff.
J. Paul Frizzelle and George M. Lindsay for defendant.

ADAMS, J. If under the fifth item of her grandfather's will Bertie Hill acquired a defeasible fee which became absolute when she died leaving issue, the plaintiff, her son, would be deemed to have taken by descent from his mother and not as a purchaser by implication under the will. *Whitfield v. Garris,* 134 N. C., 24. In this event he would be estopped by his mother's deed. *Crawley v. Stearns,* 194 N. C., 15. But if the devise be construed as a gift to the granddaughter for her life with remainder by implication to her son, the latter will be regarded as a purchaser and will not be denied the right to assert his title. The first question, then, is whether Bertie Hill was given a life estate or a defeasible fee. The answer must be sought in the testator's intent as set forth in his will; for under the accepted rules of construction the written and not the unexpressed intent must control. *Pilley v. Sullivan,* 182 N. C., 493; *McIver v. McKinney,* 184 N. C., 393; *Williams v. Best,* 195 N. C., 324.

A defeasible or determinable fee is one which may continue forever, but is liable to be determined by some act or occurrence limiting its duration or extent. Because of the possibility of its continuing forever it is called a fee; it is said to be determinable or defeasible because its continuance may be defeated or avoided by the happening of the prescribed act or contingency.

Unless the will, or some part of it, shows an intent to convey an estate of less dignity, a devise of real estate will be construed to be a devise in fee simple. C. S., 4162. A gift to a person absolutely, with a provision that if he die without leaving children the property shall go to another, vests in the primary devisee a common-law fee conditional, which is defeasible upon his death without leaving a child. *Sadler v. Wilson,* 40 N. C., 296; *Whitfield v. Garris, supra; Dawson v. Ennett,* 151 N. C., 543; *Perrett v. Bird,* 152 N. C., 220; *Smith v. Lumber Co.,* 155 N. C., 389. In the cited cases the devisees took an estate in fee defeasible upon the happening of a subsequent event; but the principle upon which they are founded has no application to devises in which by the terms of the will the first taker acquires only a life estate. To this rule there is an exception. A life estate thus given may be enlarged into a fee when the particular disposition is to be determined, not as a rule of construction, but, as in *Shelley's case,* as a rule of law or a rule of property, regardless of an intent to the contrary appearing in the will. *Reid v. Neal,* 182 N. C., 192; *Nobles v. Nobles,* 177 N. C., 245. But as shown in many of our decisions the exceptions serve to clarify and impress the rule. For example, a father having devised to his daughter Mary an estate during her natural life and to the heirs of her body, on condition if she had no heirs of her body the estate should go to his son, it was held that Mary took a life estate. *Bird v. Gilliam,* 121 N. C., 326. In *May v. Lewis,* 132 N. C., 115, it was held that Benjamin May was given a life estate by the following devise: "I loan unto my son Benjamin May my entire interest in the tract of land . . . to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin." In a later case the following clause was construed: "I leave Martha Morgan, wife of James Morgan, 48½ acres of land . . . during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." The Court said that Martha thereby acquired an estate for her natural life. *Puckett v. Morgan,* 158 N. C., 344. On this point the following cases of later date are equally conclusive: *Jones v. Whichard,* 163 N. C., 241; *Blackledge v. Simmons,* 180 N. C., 535; *Wallace v. Wallace,* 181 N. C., 158; *Reid v. Neal, supra; Welch v. Gibson,* 193 N. C., 684. The principle pervades all the recent decisions in which the question is discussed; and, indeed, so rigidly is it applied that a devisee for life with power of disposition takes an estate, not in fee, but only for his natural life. *Chewning v. Mason,* 158 N. C., 578; *Roane v. Robinson,* 189 N. C., 628. It is obvious, therefore, that Bertie Hill was given only a life estate under the fifth item of the will.

In the fourth and sixth items the devise is to the first taker so long as he or she lives, and then to his or her children; but in the fifth, to the first taker so long as she should live, and if no children then to her brother. The appellant argues that the testator intended by the fourth and sixth items to give the first taker a life estate with remainder in fee to the children, and by item five to give the first taker a fee in the event she should die leaving children.

This construction would not only strike out the words "so long as she should live," and disregard the rule that wherever possible effect must be given to every clause and every word; it would run counter to the principle uniformly maintained in the decisions to which we have referred. Morever, the difference in verbiage is not unfavorable to the plaintiff, whose mother was unmarried and apparently a mere child when the testator died. The uncertainty of Bertie Hill's leaving surviving children was the contingency which the testator had in mind and for which he made express provision.

What interest did the plaintiff get under item five? If the first taker had died leaving no surviving child, her brother would have taken the fee as contingent remainderman. But the plaintiff survived his mother, the first taker. The remainder was not given him in express terms. Was it given him by implication? That an estate may be created by implication from the language used by a donor in a written instrument is unquestionable. "By a will an estate may pass by mere implication, without any express words to direct its course, . . . and where implications are allowed they must be such as are necessary, or highly probable, and not merely possible." 3 Bl., 381. But in *Hauser v. Craft,* 134 N. C., 319, it is said that where the devise is in the first instance to the parent for life and then over to ulterior devisees if the parent die without leaving children, the law will raise an estate in remainder by implication in favor of surviving children upon *slight indication* of an intention to to that effect. In the clause there construed Katherine Scott was given certain property which was to be hers during her natural life only, "and should she die without leaving any child or children the property was to be divided among the rest of the testator's heirs." She died leaving children. The Court held in an exhaustive opinion written by *Walker, J.*, that she took a life estate and that her surviving children took an estate in remainder at her death by implication.

The language used in item five is substantially the same as that which was construed in *Hauser v. Craft.* Construed in the light of the testator's manifest intention it should read, "to her (Bertie Hill) so long as she shall live, and, if she die leaving no children, then to her brother, Frank Hill." C. S., 1737; *Willis v. Trust Co.*, 183 N. C., 267; *Vinson v. Gardner,* 185 N. C., 193. This interpretation conforms to settled principles. Bertie Hill's interest ceased at her death. Frank Hill took nothing because his contingent interest was dependent upon the death of his sister leaving no children. There is a presumption against intestacy, and unless the plaintiff has the remainder the fee is in abeyance or must revert to the testator's heirs. We have not discovered any indication of such an intent in Bryant Mooring's will. The judgment is

Affirmed.

L. D. ROEBUCK AND WIFE, HANNAH ROEBUCK, v. J. J. CARSON AND J. L. GURGANUS, TRUSTEE.

(Filed 2 October, 1929.)

Appeal and Error J a—In injunction proceedings Supreme Court may review evidence, but it is presumed that the judgment is correct.

While the Supreme Court may review the evidence and findings of fact by the court below upon appeal in injunction proceedings, the presumption is that the judgment of the lower court is correct, with the burden of showing error on the appellant, and where the court does not find the facts and there is no request therefor, it is presumed that he found the proper and necessary facts, and the judgment will be affirmed.

CIVIL ACTION, before *Moore, Special Judge.* From MARTIN. Heard at Chambers 4 May, 1929.

This case was considered by the Court upon a former appeal reported in 196 N. C., 672, 146 S. E., 708. The only difference in the facts in the present case and upon the former appeal is that it is alleged in the present case that "after the execution and delivery of the notes and deed of trust . . . there was an agreement between plaintiffs and defendant Carson as to the extension of time of payment of the notes above referred to; . . . that the defendant Carson promised and agreed that if the plaintiff, L. D. Roebuck, would pay him the sum of $500 that he (defendant) would extend the time for the payment of the notes above referred to for and during the term of . . . Carson's natural life," etc. Plaintiffs secured a temporary restraining order, returnable before *Clayton Moore, Special Judge,* on 4 May, 1929.

Upon hearing the motion, the following judgment was rendered:

"After considering the pleadings the court is of the opinion and doth adjudge that the restraining order heretofore issued be, and the same is hereby dissolved."

From the foregoing judgment the plaintiffs appealed.

B. A. Critcher for plaintiffs.
Elbert S. Peel for defendants.

PER CURIAM. The judge dissolved the restraining order, but found no facts. It does not appear that either party requested a finding of facts. In such cases the determinative principle of law is thus stated in *Wentz v. Land Co.,* 193 N. C., 32. "In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *Angelo v. Winston-Salem,* 193 N. C., 207, 136 S. E., 489; *Lineberger v. Cotton Mills,* 196 N. C., 506, 146 S. E., 215. The theory upon which these decisions rest is that it is to be presumed, nothing else appearing, that the judge found the proper and necessary facts to support the judgment.

Affirmed.

NEILL McK. SALMON, WILLIAM E. SALMON AND FRANCES SALMON ATKINS v. W. F. McFARLAND.

(Filed 2 October, 1929.)

Injunctions D b—Judgment in this case continuing restraining order to final hearing affirmed.

Where upon the hearing the court finds that the defendant failed to comply with the terms of his contract for the purchase of certain lands and had abandoned the contract, and had thereafter trespassed upon the lands and cut and removed timber therefrom, and that the defendant is insolvent, a judgment continuing a temporary restraining order to final hearing will be affirmed on appeal.

CIVIL ACTION, before *Midyette, J.* From LEE. Heard at Chambers on 24 May, 1929.

The plaintiffs alleged that they were the owners of and in possession of a tract of land in Lee County, containing about 900 acres, and that the defendant, without any claim, title or license, had "at divers times entered upon the said premises and cut and removed timber therefrom, and is now cutting and removing from said land certain timber of great value." The plaintiffs pray for a restraining order. The defendant filed an answer, alleging that he had purchased the land in controversy and had made extensive improvements thereon, and was ready, able and willing to comply with the contract of purchase. A temporary restraining order was issued and made returnable before Midyette, J., who found that "the plaintiffs are the owners of and in possession of the land, and that the defendant has failed to comply with any of the terms or conditions stipulated in said contract; that he has neither paid, offered to pay or tendered any portion of the consideration named in said contract, and that the whole of the consideration named therein became due prior to the institution of this action." It was further found as a fact "that subsequent to the execution of said contract the defendant abandoned the same and possession claimed thereunder; that the defendant has during the past several months at divers times, entered and trespassed upon the land described in the complaint, and cut and removed valuable trees and timber therefrom. . . . That the defendant is insolvent and unable to respond in damage for the injury to plaintiffs' land," etc.

Thereupon it was ordered and adjudged that the temporary restraining order "be, and the same is hereby continued to the final hearing of this cause," etc.

From the foregoing judgment the defendant excepted and appealed.

No counsel for plaintiffs.
Baggett & McDonald for defendant.

PER CURIAM. The facts found by the trial judge are definite and specific, and fully support the judgment continuing the injunction to the final hearing.

Affirmed.

H. L. EDWARDS AND EMMA G. EDWARDS, HIS WIFE, v. H. D. SPENCE.

(Filed 2 October, 1929.)

Mortgages H b—Plaintiff must pay amount admitted to be due in order to enjoin foreclosure until issue of usury is determined.

The plaintiff in a suit to enjoin the foreclosure of a mortgage on his lands upon the ground that he does not owe the entire amount claimed in that usury was charged in the notes secured by the mortgage, must pay the amount admitted to be due with six per cent interest, or the temporary restraining order theretofore issued will be dissolved upon the principle that one seeking equity must do equity.

APPEAL by plaintiffs from an order of *Grady, J.*, at Chambers on 19 April, 1929. Affirmed.

Shaw & Jones for plaintiffs.
Whitaker & Allen for defendant.

PER CURIAM. In Judge Grady's order the recitals are the execution by the plaintiffs to the defendant of two notes, each in the sum of $2,000, secured by a mortgage on lands, an allegation by the plaintiffs that the loan made them by the defendant was only $3,500, and that $500 was charged as a bonus or as usury. These allegations were denied. The plaintiffs asked that a sale of the land under the mortgage be enjoined until the issues joined could be determined by a jury. The order required the plaintiffs who sought equity to do equity by paying the amount admitted to be due and interest thereon at six per cent. They failed to comply with the order and the restraining order was dissolved. Under these circumstances the judgment must be affirmed. *Waters v. Garris,* 188 N. C., 305.

Affirmed.

PIEDMONT ELECTRIC COMPANY v. VANCE PLUMBING & ELECTRIC COMPANY, STEVENSON THEATRES, INC., AND S. S. STEVENSON.

(Filed 9 October, 1929.)

Laborers' and Materialmen's Liens C a—Amount of subcontractor's lien extends only to amount owed contractor at time of notice.

The right of a subcontractor to recover for material furnished the owner of a building is out of the funds due the original contractor by the owner at the time notice is given by the subcontractor, and under the provisions of our statutes is enforceable by suit into the contract between the owner and the original contractor, and where the original contractor has abandoned his contract and the owner has been forced to spend more money to complete the contract than was due the original contractor under its terms, the subcontractor can recover nothing in his action against the owner for material furnished, there being nothing due the original contractor. C. S., 2437, 2439, 2442.

APPEAL by plaintiff from *Barnhill, J.,* at March Term, 1929, of VANCE. No error.

S. S. Stevenson owned a lot in the city of Henderson. He leased it for a term of years to Stevenson Theatres, Inc., who after erecting on it a building comprising a store, a theater, and offices, made a contract with the Vance Plumbing & Electric Company to do plumber's work, to provide for heating the building and for putting in electrical wiring. The Vance Company gave Stevenson Theatres, Inc., a bond in the penal sum of $4,530, with the Metropolitan Casualty Insurance Company of New York as surety, conditioned to indemnify the obligee from pecuniary loss. The plaintiff furnished the Vance Company electrical material, wiring, fittings, and fixtures, which were used in the building, at the price of $592.54. Sometime prior to 5 February, 1927, the Vance Company abandoned its contract; and on 5 February, 1927, it delivered to Stevenson Theatres, Inc., invoices for material furnished the Vance Company by the plaintiff. Before these invoices were delivered the Vance Company, being insolvent, went into the hands of a receiver. The contract price of the work to be done by the Vance Company was $9,228. The contract provided that the first payment was not to be due before 14 June, 1926, and that subsequent payments should be made every thirty days thereafter, and that each payment, except the last, should include not more than 85 per cent of all labor and materials in the buildings or on the grounds. Stevenson Theatres, Inc., retained 15 per cent (or $1,161.13) of all estimates approved in accordance with the contract; it had in its hands also an additional sum, part of the contract price, when the Vance Company abandoned its contract.

The plaintiff brought suit against the defendants for $592.54, alleging that upon filing its itemized bills for material with Stevenson Theatres, Inc., the latter became indebted to it just as it would have been indebted if the contract had been made between these two parties. The verdict was as follows:

1. Is the Vance Plumbing & Electric Company indebted to the plaintiff for material furnished in the construction of the building upon the premises described in the complaint? If so, in what amount? Answer: $592.54, with interest.

2. If so, did Piedmont Electric Company give notice to the defendants of the existence of said debt prior to the completion of said contract? Answer: Yes.

3. If so, what part, if any, of the contract price was then unpaid? Answer: $2,648.43.

4. Was any part of said contract price then due the contractor? If so, in what amount? Answer: No.

5. Did any part of the unpaid balance on contract price thereafter become due the contractor, and if so, in what amount? Answer: No.

There was no exception to the issues. Judgment for defendants and appeal by plaintiff upon assigned error.

J. H. Bridgers for plaintiff.
Thos. W. Ruffin for defendants.

ADAMS, J. Although the Vance Plumbing and Electric Company, Stevenson Theatres, Inc., and S. S. Stevenson are named as defendants, the only answer appearing in the record is that of Stevenson Theatres. The first issue, it will be observed, is restricted to the controversy between this defendant and the plaintiff, and the answer to it was entered by consent. As the answer to the second was not seriously contested, it is apparent that the last two issues are addressed to the decisive matters in dispute. It is well to bear in mind that the building for which the materials were furnished was not erected by a county, city, town, or other municipal corporation and is not one of those to which C. S., 2445 applies. It is private property; and the bond given in evidence was executed, not by Stevenson Theatres for the benefit of the plaintiff, but by the Vance Plumbing and Electric Company to save the Stevenson Theatres from pecuniary loss resulting from a breach of the contract. The surety on the bond is not a party to the action.

The Vance Company had become insolvent and had gone into the hands of a receiver before the plaintiff gave notice of its claim to Stevenson Theatres. The jury found, in response to the third issue, that of the contract price for which the Vance Company had agreed to do the work, $2,648.43 was then unpaid. The plaintiff contends that out of this amount its debt should be paid; Stevenson Theatres, Inc., contends that because of the insolvency of the Vance Company it was compelled to complete the work at a cost in excess of the unpaid part of the purchase price, and that it was therefore not indebted to the Vance Company when the plaintiff's notice was served.

The statute which gives to subcontractors and laborers who furnish labor or material for building, repairing, or altering any house, a lien on the house and real estate, provides, also, that the sum total of all liens due subcontractors and material men shall not exceed the amount due the original contractor at the time the notice is given. C. S., 2437. In section 2438 it is provided that the owner of the real estate, after notice is given him, shall "retain out of the amount due the said contractor under the contract as much as is due or claimed by the subcontractor, laborer, or material man, and that no payment to the contractor shall be a credit on or discharge of the lien." Section 2439 makes it the duty of the contractor, before receiving any part of the contract price, to furnish the owner an itemized statement of the amount owing by the contractor, and likewise makes it the duty of the owner thereupon to retain from the money due the contractor a sum, not exceeding the price contracted for, which shall be sufficient to pay the laborer, artisan, mechanic or material man.

These statutes, considered in connection with those which immediately follow them, contemplate the enforcement of a lien by the contractor, laborer, or material man, after due notice, when the owner neglects or refuses to retain an adequate sum or a proportionate part thereof (C. S., 2442) out of the amount "due the contractor under the contract." Accordingly, it was said in *Clark v. Edwards,* 119 N. C., 115, that the lien is good only for the amount due the contractor, laborer, or material man and that the subcontractor, who can only sue into the contract, can be put in no better condition. See *Building Supplies Co. v. Hospital Co.,* 176 N. C., 87. And in *Mfg. Co. v. Blaylock,* 192 N. C., 407: "The policy of the lien law is to protect subcontractors and laborers against loss for labor done and materials furnished in building, repairing or altering any house or other improvement on real estate, to the extent of the balance due the original contractor at the time of notice to the owner of the claims therefor, but it is not provided that the owner shall be liable in excess of the contract price, unless he continue to pay after notice of claim from the subcontractor or laborer, and these only to the extent of such payments after notice."

Stevenson Theatres, Inc., had the right under the terms of the contract to retain 15 per cent of the contract price until the completion of the work; and if, as found by the jury, the cost of completing the work exceeded the unpaid part of the contract price, there was no amount due the contractor, in contemplation of law, out of which the plaintiff's claim should be paid, at the time its notice was given; and the plaintiff would be entitled to no relief by claiming to be substituted to the rights of the contractor.

It is not necessary to review the cases cited in the appellant's brief, for the reason that the controlling facts in them differ from those in the case under consideration. It may be noted, however, that the first paragraph in the syllabus prefixed to *Lumber Co. v. Hotel Co.,* 109 N. C., 658, seems to be at variance with the fact that "at the time of such notification the defendant owed the said Sanford, as contractor, the sum of $9,025." We find

No error.

LARRY DAWSON AND D. G. WHITE, TRADING AS DAWSON & WHITE, v. NATIONAL BANK OF GREENVILLE, N. C., ET AL.

(Filed 9 October, 1929.)

1. **Bills and Notes I a—Upon payment of check without endorsement the drawee bank makes acceptance and is liable to payees.**

While a bank is not ordinarily liable to the payee of a check it may become liable to him upon its acceptance or certification of the check, and where the bank has paid the check otherwise than to the payees or some person authorized by them to receive payment and has charged the amount to the drawer, the bank has accepted the check and the payees may hold it liable thereon. C. S., 3171. In this case the drawer having authorized payment as if made to bearer is estopped from holding the bank liable, and had agreed to save the bank harmless in the action.

2. **Same—Burden of showing proper payment is on the bank.**

In an action by the payees of a check against a bank for paying the check otherwise than to them or to some person authorized by them to receive payment, the burden is on the bank admitting acceptance to show proper payment.

3. **Same—Where check is payable to two payees payment to one without authority of the other does not relieve bank of liability.**

Where a check is payable to two or more persons as payees, or to their order, the amount of the check must be paid to both payees or upon the order of both, and payment to one of the payees or to the order of one without the authority of the other, does not discharge the bank of its liability unless the payees are partners, and evidence of payment to one of the payees is properly excluded. C. S., 3022.

4. **Same—Evidence of local custom of payment of checks as if drawn to bearer is incompetent in bank's defense.**

Evidence of a local custom of paying checks of tobacco warehousemen as if made to bearer, is properly excluded in an action by the payees of a check, after acceptance by the bank, against the bank for paying the check to others without their authority or endorsement, title to a check being transferable only by endorsement and delivery. C. S., 3010.

APPEAL by defendants from *Daniels, J.*, at March Term, 1929, of PITT. No error.

Action by the payees to recover of the drawee bank the amount of a check, payable to their order. The check was presented for payment by a holder, without the endorsement of the payees. The bank paid the amount of the check to said holder, and charged said amount to the account of the drawers.

The drawers of the check had authorized the bank to pay said check, although drawn payable to the order of the payees named therein, as if it had been drawn payable to bearer. They admitted that the drawee bank was not liable to them for the amount of the check, and agreed that in the event plaintiffs recover judgment in this action against the drawee bank, the said bank is entitled to judgment against them for the amount which plaintiffs shall recover of the said bank.

There was no evidence tending to show that the payees knew, when the check, payable to their order, was issued to them by the drawers, in payment of tobacco sold by the drawers as warehousemen for the plaintiffs, that the drawers had authorized the drawee bank to pay said check without their endorsement, as if the check had been drawn payable to bearer.

The issues submitted to the jury were answered as follows:

1. Did the defendant National Bank pay the proceeds of the check in controversy to the plaintiffs or to any person authorized by the plaintiffs to receive payment? Answer: No.

2. Is the defendant National Bank indebted to plaintiffs and, if so, in what amount? Answer: $359.03, with interest from 21 October, 1926.

From judgment on the verdict, defendants appealed to the Supreme Court.

Albion Dunn for plaintiffs.
J. C. Lanier for defendants, Moye & Gentry.
F. G. James & Son for defendant, National Bank.

CONNOR, J. This action was first tried at May Term, 1928, of the Superior Court of Pitt County. From judgment rendered at said trial, dismissing the action, as upon nonsuit, at the close of the evidence for plaintiffs, plaintiffs appealed to this Court. On said appeal, the judgment was reversed. *Dawson v. Bank,* 196 N. C., 135, 144 S. E., 833. In the opinion it is said: "The law in this State, both by statute and by authoritative decisions of this Court, is to the effect that the payee of a check cannot maintain an action upon the check against the bank on which the check is drawn, unless and until the check has been accepted or certified by the bank. C. S., 3171. *Trust Co. v. Bank,* 166 N. C., 112, 81 S. E., 1074."

Ordinarily, when the drawee bank declines to pay the check, or has paid the amount of the check to one who is not entitled to receive said amount, only the drawer of the check can maintain an action against the drawee bank, on the check, or for its amount. *Land Bank v. National Bank, post,* 526.

In this case, however, it was held that upon the facts which the evidence offered by plaintiffs tended to show, plaintiffs, as payees of the check, are entitled to recover of the defendant bank, unless said bank can satisfy the jury by evidence, that the amount of the check had been paid by it to the payees, or to some person authorized by them to receive payment. The drawers of the check had authorized payment of the check to a holder without the endorsement of the payees, and were therefore estopped from contending that the bank was in any aspect of the case liable to them for the amount of the check. They have agreed to save the bank harmless in this action.

It was held on the former appeal that the action of the bank was in effect an acceptance of the check, and rendered the bank liable to the owner of the check for its proceeds. Payment of the proceeds to one who was not the owner of the check did not discharge the bank of liability to such owner. When the bank accepted the check, and charged its amount to the account of the drawers, it impliedly undertook to pay the proceeds of the check to the true owner.

Defendants' contention on this appeal that there was error in the ruling of the trial judge that the burden of the issue was on the defendant bank, and not on the plaintiffs, cannot be sustained. This ruling was correct on principle, and is in accord with the authorities both here and elsewhere. The burden was on the bank which admitted that it had accepted the check, and charged same to the account of the drawers, to show that it had paid the amount of the check to the payees, or to some person authorized by them to receive payment. *Land Bank v. National Bank, supra.*

There was no error in excluding evidence tending to show a custom, at Greenville, N. C., in accordance with which checks issued by tobacco warehousemen for the payment of tobacco sold by them for farmers, although such checks were drawn payable to the order of payees named therein, were paid by the drawee banks of said city, upon their presentment, to holders without the endorsement of the payees, just as if said checks were drawn payable to bearer. This custom, if it existed, could not affect the rights of payees of checks, drawn payable to their order, under the laws of this State. The title to a check payable to the order of the payee can be transferred only by the delivery of the check, with the endorsement of the payee thereon. C. S., 3010. The title to such check, and the right to its proceeds, when the check has been accepted for payment by the drawee bank, remains in the payee, until he has transferred the check by endorsement and delivery and thereby directed payment to be made to another. Payment of such check to one who is not a holder under the endorsement of the payee, is at the risk of the drawee bank.

Defendants offered evidence which they insist tended to show that the amount of the check was paid to one of the payees. This evidence was properly excluded upon objection by the plaintiffs. Defendants concede that they had no evidence tending to show that payment to one of the payees was authorized by the other payee. Where a check is payable to two or more persons as payees, or to their order, the amount of the check must be paid to both payees or upon the order of both. Payment to one of the payees or to the order of one payee without the authority of the other payee, does not discharge the drawee bank of its liability for the amount of the check, unless the payees are partners. C. S., 3022.

We find no error in the trial of this action. The judgment is affirmed.

No error.

J. A. PERRY, ADMINISTRATOR, ET AL., v. ZONNIE WIGGINS ET AL.

(Filed 9 October, 1929.)

1. **Judicial Sales B a—Under facts of this case action of trial court in setting aside deed under judicial sale is affirmed.**

The purchaser at a judicial sale of land under proceedings for partition may, by motion when the matters are *in fieri*, have the court to exercise its equitable discretion to set aside the deed when it appears that his title is substantially defective and that the parties may be put in *statu quo* and the action of the court in so doing when the proper findings of fact are supported by the evidence will be upheld on appeal.

2. **Judicial Sales C a—Caveat emptor does not apply to judicial sales under order of court.**

The doctrine of *caveat emptor* does not apply to judicial sales under orders of court in its equitable jurisdiction, and where under such order an entire tract of land is to be sold the purchaser at the sale has a right to rely upon the court to give him a good title to the whole tract, nothing appearing to put him on notice that a less estate would be offered at the sale.

APPEAL by plaintiffs from *Small, J.*, at February Term, 1929, of NASH. Affirmed.

The court below found the facts and rendered judgment as set forth in the record. The plaintiffs made numerous exceptions and assignments of error to the findings of fact by the court below and the judgment rendered, and appealed to the Supreme Court.

J. S. Manning and L. T. Vaughan for plaintiffs.
Cooley & Bone for petitioner, C. H. Bunn.

CLARKSON, J. The question involved is whether or not the court below in its equitable discretion rightfully exercised its power to set aside a deed executed under order of the court at a judicial sale, the deed purporting to, but did not, convey a fee-simple title to the whole land? We think, under the facts and circumstances of this case, the court below in its exercise of equitable powers rightfully set aside the deed. There was sufficient evidence for the court below to base its findings of facts, briefly, as follows:

A special proceeding was instituted by plaintiffs against the defendants for the partition of certain lands. A sale was ordered and the land, on 3 May, 1926, exposed for sale at public auction and C. H. Bunn became the last and highest bidder at the price of $705.00. Bunn complied with the terms of sale and, in accordance with the decree in the cause, the commissioners made him a deed purporting to convey a fee-simple title for the whole land. It was discovered, before the decree was confirmed, that the title was defective in that four certain parties who owned an interest in the land had not been served with summons, but this was done after the decree and after the deed purporting to convey fee-simple title to the whole land was executed. One of the new parties filed an answer asking that her interest in the property be not sold. The purchase money paid by Bunn is still in *custodia legis* except the advertising cost has been paid. The payment of the rent money was held up awaiting the orders of the court. Some of the parties interested in the property are in possession and have never surrendered same and the said Bunn has never been put in possession or received any rent and has never had a perfect title. That the title is substantially defective in that the purported deed of the commissioners does not convey a fee-simple title to the whole of said property. That the purchase money has been held by the court for over two years and the purchaser has received no interest nor any revenue therefrom. That the title has never been perfected. The court below on these facts was of the opinion that all the parties should be restored to their original *status quo,* and so ordered. C. H. Bunn, the purchaser at the commissioners sale, after notice by motion and petition in the cause setting forth the facts, prayed that the parties be put in *status quo.* Since this motion and petition, the defendants *now* put in an answer, and their prayer is as follows:

"Wherefore, the defendants pray the court that they may be heard upon the merits of this action, that any purported sale or other proceedings affecting the title to the above described tract of land be set aside, vacated and declared void and of no effect, and that such order as may be necessary shall be made to restore to herself and her brothers and sisters and their legal representatives such interest in the above described tract of land as they originally acquired by reason of the death of their brother, O. Z. Wiggins."

It appears from the record that this partition proceeding was interlocutory—*in fieri*—and the purchaser Bunn was not negligent or estopped from making the application by motion and petition in the cause.

In 16 R. C. L. (Judicial Sales), at p. 121, the law is stated: "However, in its modern application to judicial sales, the rule of *caveat emptor* has been somewhat relaxed; and it is now generally conceded that a purchaser at a judicial sale is entitled to expect and obtain a sound and marketable title to the property sold. The purchaser should therefore not be compelled to accept a defective or doubtful title, or to complete the sale or pay the purchase money until the defect is obviated. He is entitled to a good and marketable title and one that is free from equities, encumbrances and all reasonable doubt. Furthermore a person who, in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly stated has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable."

In *Edney v. Edney,* 80 N. C., at p. 85-6, speaking to the subject, it is said: "It is settled in this State, that in judicial sales, a good title is to be deemed as offered, and the purchaser will not be compelled to pay his money and take a title substantially defective, unless the sale be made of an estate or interest short of the entire title, and so expressly mentioned on the face of a decree, or clearly implied from the nature of the sale. *Shields v. Allen,* 77 N. C., 375. To this rule we fully assent as material to establish a confidence in sales made by authority of the court, and as conducing to beget fair competition of bidders. And we agree that the doctrine of *caveat emptor* should not apply to such sales, unless there be something on the face of the decree indicating a sale of some estate or interest defective, or less than a whole title, and thereby putting the purchaser on his guard and at his own risk."

In *Carraway v. Stancill,* 137 N. C., at p. 476, it is said: "Courts of equity do not knowingly offer a disputed and litigated title for sale to the public, and especially by decree in the very action in which one of the defendants sets up a bona fide title to the land. Bidders and purchasers at execution sales have to look out for themselves, and they get only such title as the sheriff can convey. They may get something; they may get nothing; they know this when they bid. Judicial sales are decreed and conducted upon entirely different principles. Under such sales the purchaser has a right to look to the court to protect him. If the title fails and the money is still in *custodia legis,* the court will refund it or make such orders and decrees as are necessary and proper to perfect the title, if that be practicable."

The record discloses that the title to the land deeded by the commissioners to Bunn was substantially defective. The purchase money was held by the careful commissioners in *custodia legis*—they realizing that if they paid out the money with the uncertainty as to the true owners, some of whom were not served with summons, that they might be personally liable. The title has never been perfected. In fact, after the proceeding was *in fieri* and title not perfected, the record discloses that the defendants themselves do not *now* desire the property sold for partition. On the present record it appears that it is doubtful if a good fee-simple title to the whole land could ever be made. A purchaser at a judicial sale is not required to wait indefinitely until a defective title of a substantial nature is cured. The court below, exercising its equitable power, decreed that the parties be restored to their original *status quo*. In this we think there was no error. The judgment below is

Affirmed.

NORFOLK SOUTHERN RAILROAD COMPANY v. RAPID TRANSIT COMPANY, R. E. RICKS, RECEIVER.

(Filed 9 October, 1929.)

Trespass A b—Use of land beyond license constitutes trespass ab initio.

The permission of a carrier by rail to its patrons to store cotton on its platform confers upon them the right to remove the cotton, but does not extend to the right to permit a competitive carrier to do so for the purpose of transporting the cotton over its own line, and the competitor's acts in so doing is trespass *ab initio.*

CIVIL ACTION, before *Lyon, J.,* at May Special Term, 1929, of PITT.

The plaintiff is a corporation operating a line of railway in North Carolina as a common carrier of freight and passengers, and in connection with such business is the owner of a lot of land in the town of Greenville, North Carolina, bounded on the north by Ninth Street; on the east by the right of way of plaintiff company; on the south by Tenth Street, and on the west by the warehouse property of F. V. Johnson. Several years ago the plaintiff constructed a platform upon said property and has permitted various persons to store cotton thereon pending shipment, and has also permitted the public cotton weigher of the town of Greenville to go upon said platform and weigh cotton. The defendant is the owner of a cotton platform in the town of Greenville some distance from plaintiff's property, which said platform has been used for storing cotton.

The evidence further discloses that the defendant is engaged in the business of operating trucks for transporting cotton and other commodities from Greenville to other points in this State. In November, 1927, the defendant, through its agents and employees, went upon the platform of plaintiff and removed therefrom cotton for the purpose of transporting or shipping said cotton to other points. In procuring the cotton the defendant used a truck and trailer. The plaintiff notified the defendant to stay off its premises, as it was a competitor and had no right to come upon plaintiff's property with trucks and trailers to remove cotton from its platform. The defendant refused to remain off plaintiff's land and platform, but persisted in coming there and removing and shipping cotton, contending that the owners of cotton had authorized the entry upon plaintiff's land for the purpose aforesaid. Whereupon plaintiff applied for an injunction to restrain further trespass upon its property by the defendant and its agents. Thereafter the restraining order was dissolved and the plaintiff appealed. The appeal was disposed of in 195 N. C., p. 305, 141 S. E., 926. Subsequently the question came on for hearing upon its merits. The following issues were submitted to the jury:

"1. Did the defendant commit a trespass in going upon the premises of the plaintiff railroad company and hauling away the cotton of Speight & Company, and others, as alleged?"

"2. What damage has the defendant Rapid Transit Company sustained by reason of the injunction issued and continued against said defendant?"

The trial judge directed the jury to answer the first issue "Yes," and the second issue "No."

From judgment upon the verdict the defendant appealed.

F. G. James & Son for plaintiff.

J. Con Lanier and Albion Dunn for defendant.

Brogden, J. The cotton platform owned by the plaintiff was private property, and so far as the evidence discloses, was not subject to any public duty or obligation. Various parties in Greenville had been permitted by the plaintiff to bring cotton to the platform where the official weigher was stationed. The cotton weigher was employed by the county and there was no contract between the county and the plaintiff for using the platform, but such platform was used merely by the license and permission of plaintiff. Certain cotton dealers of Greenville purchased cotton upon the platform and thereafter authorized the defendant to proceed to the platform with a truck and trailers to remove said cotton, not for the purpose of delivering same to the owners, but for the purpose of shipping and transporting it as a competitor of the plaintiff.

The plaintiff relies upon the rule of law declared by a majority of the courts to the effect that a railroad company, so long as it affords reasonable accommodation to the public, may grant to one person the exclusive privilege of entering its stations and grounds for the purpose of soliciting patronage. The principle is tersely expressed in *Delaware L. & W. R. Co. v. Town of Morristown,* 276 U. S., 182, 48 Supreme Court Reporter, 276: "There was no duty upon petitioner to accord to other taxicabmen the use of its lands simply because it had granted Welsh the privileges specified in its contract with him. Petitioner is not bound to permit persons having no business with it to enter its trains, stations or grounds to solicit trade or patronage for themselves; they have no right to use its property to carry on their own business." *Black & White Taxi. & T. Co. v. Brown & Yellow Taxi. & T. Co.,* 276 U. S., 518, 48 Supreme Court Reporter, 404; *Thompson's Express & Storage Co. v. Mount,* 111 Atlantic, 173, 15 A. L. R., 351. These decisions, of course, have a general application to the question involved in this appeal, but do not decide the exact point presented. The controlling question upon this record is whether the owner of cotton can send an agent to the platform of the plaintiff and remove the cotton for shipment to other points, when the agent so selected is himself a competitor of the plaintiff. Obviously, this would amount to permitting the competitor to use plaintiff's property in order to carry on his own business. Furthermore, the evidence tends to show that the plaintiff permitted the owners of cotton to use the platform for storing the same which, of course, conferred the right upon such owners to enter the premises and remove the property. Clearly, this was a mere license. Therefore, when the defendant entered upon the premises of the plaintiff not for the purpose of delivering the cotton to the owner, but for the purpose of shipping and transporting it as a competitor of the plaintiff, there was an abuse of the license, for the reason that the license was extended to a point far beyond that which was essential to the enjoyment of the right conferred by the railroad upon the owners of the cotton. In this aspect of the law the defendant became a trespasser *ab initio.* Thus in *Bear v. Harris,* 118 N. C., 476, the defendant purchased the cargo of a vessel upon condition that the same should be removed within thirty days. Thereupon the defendant moved the vessel about two miles down the river in order to procure a more convenient landing place for the cargo. The vessel was caught in a storm and damaged. The plaintiff brought suit against the defendant for damages, and the defendant took the position that as he had a right to enter the vessel and remove the cargo, he was not a trespasser, and therefore not liable. The Court said: "The right to enter the boat at the wharf within thirty days and remove the cargo was not an implied license to remove the schooner to another place for convenience and unload. It was not a necessity, but was the abuse of a legal license, and made the defendant a trespasser *ab initio.*" Again in *Gardner v. Rowland,* 24 N. C., 247, the plaintiff gave to the defendant permission to enter his land and remove some corn, directing that the defendant enter the land through the gate. Instead of doing this defendant pulled down the fence. The Court held that the defendant was a trespasser. *Gaston, J.,* writing the opinion, said: "Now it is not reasonable, and therefore not legal, to presume a more extensive license than is essential to the enjoyment of that which was expressly granted."

Upon the record, the instruction of the trial judge was correct and the judgment is

Affirmed.

J. J. WALLER AND EVA WALLER, HIS WIFE, AND MARIE ELIZABETH DAVIS AND CHARLIE DAVIS, v. GEORGE O. BROWN ET AL.

(Filed 9 October, 1929.)

Deeds and Conveyances C c—In this case held: deed conveyed life estate to B. with remainder to his children living at his death.

Under a deed of gift to the grantor's son, using the words "lend to him during his life, and after his death to his children," with *habendum* "to them and their heirs in fee simple," the word "lend" will be construed as a word of conveyance to effectuate the intent of the grantor as expressed in the instrument, and the son takes a life estate in the lands with remainder over to his children living at the time of his death, and the deed does not operate as a conveyance directly to the children living at the time the deed was made, reserving a life estate to the son, and they do not take to the exclusion of the children born thereafter.

APPEAL by plaintiffs from *Nunn, J.,* at June Term, 1929, of LENOIR. Affirmed.

Controversy without action on an agreed statement of facts. On 30 January, 1884, Haywood Waller and his wife executed and delivered to Andrew Waller a written instrument, the material facts of which are as follows:

"This deed made this 30 January, 1884, by Haywood Waller and wife, Charlotte Waller, of Lenoir County, and State of North Carolina, of the first part, to Andrew Waller, of Lenoir County, and State of North Carolina, of the second part, witnesseth:

"That the said Haywood Waller and wife, Charlotte, in consideration of the love and affection which we bear our son, Andrew J. Waller. We do lend to him during his life a tract of land to the said Andrew J. Waller, and after his death we give the land to his children, all the right, title, interest and estate, a tract of land in Lenoir County, State of North Carolina, adjoining the lands of Jesse Nobles, Woodley Decton and Acy Waller and others bounded as follows, containing 46 acres. . . .

"To have the use of said land during his life, and after his death we give the land to his children, only excepting the use of timber for ourselves.

"To have and to hold to them and their heirs in fee simple forever the aforesaid tract of land, and all privileges and appurtenances thereto belonging to the said Andrew J. Waller's children, their heirs and assigns, to their only use and behoof forever."

When the deed was executed Andrew Waller had three living children; the two plaintiffs J. J. Waller and Marie Elizabeth Davis, and Viola Hall, one of the defendants. After the execution of the deed there were born to Andrew Waller and his wife the following children: James H. Waller, Henry J. Waller, Tiffany Waller Smith, Essie Waller Brown, and Ellen Waller Smith. Andrew Waller took and held possession of the land as life tenant until his death in 1929. All his children survived him, except Ellen Waller Smith, who died 5 March, 1920, survived by her husband and six children, who are defendants. On 22 February, 1923, prior to the death of Andrew Waller, the plaintiff J. J. Waller conveyed a one-eighth interest in the land to M. F. Waller, and on the same date James H. Waller and Henry J. Waller each conveyed a one-eighth interest to M. F. Waller. On 10 July, 1926, M. F. Waller died intestate survived by his widow and several children. All the parties in interest are parties to this proceeding.

The plaintiffs, two of the three children who were living when the deed was executed to Andrew Waller, brought an action against the defendant to recover possession of the land (except as to the one-eighth interest they had conveyed), and damages, claiming that the whole title vested in the children who were living when the deed was executed and that the children born thereafter had no interest in the land. The defendants denied the plaintiff's allegations and pleaded tenancy in common and asked that the land be partitioned among the tenants.

It was adjudged at the hearing that upon the death of Andrew Waller and the termination of his life estate in the lands the interest in remainder vested in his children as a class living and in being at the time of his death, that the children of Ellen Waller Smith, grandchildren of the grantor, had no legal interest in the land. The prayer of the plaintiffs was denied and the cause was remanded to the clerk for proceedings in partition. The plaintiffs excepted and appealed.

Shaw & Jones for plaintiffs.
Whitaker & Allen and Powers & Elliott for defendants.

ADAMS, J. The appellants argue *in limine* that the grantors in the deed conveyed the land therein described directly to the living children of Andrew Waller, reserving to him the use of the land for his life without the creation of an intervening estate of freehold; that as there is no conveyance to Waller there can be no remainder vested or contingent; and that the children born after the execution of the deed can have no interest in the property. This argument, we presume, is founded on the phraseology of the deed; more particularly, no doubt, on the words, "We do lend to him during his life."

An effective deed must, of course, contain operative words of conveyance—words which indicate the grantor's intention to convey his property; but the absence either in deeds or in wills of technical operative words will not usually be regarded as adequate cause for defeating an intention which is found upon examination of the whole instrument to be plainly though untechnically expressed. It was remarked in *Elliott v. Jefferson,* 133 N. C., 207, 214, that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. Henry Waller and his wife no doubt regarded the word "lend" as synonymous with the word "convey," their manifest purpose being to convey to Andrew Waller an estate for his life. This is the meaning frequently given the word in the construction of wills. *Smith v. Smith,* 173 N. C., 124; *Robeson v. Moore,* 168 N. C., 388. It is the meaning given it by this Court in the construction of a deed. *Edgerton v. Aycock,* 123 N. C., 134.

Andrew Waller having taken a life estate, our decision involving the controversy of the remaindermen will be controlled by the case of *Powell v. Powell,* 168 N. C., 561. In its distinctive features the deed there construed is almost identical with the one now under consideration, the difference being a provision in the former that in the event of the death of any one of the remaindermen during the existence of the life estate his interest should go to his surviving child or children—a provision similar to that in *Mercer v. Downs,* 191 N. C., 203, and in *Trust Co. v. Stevenson,* 196 N. C., 29. The absence of this provision in the deed before us does not affect the construction or the decisive point. The decision in *Powell v. Powell, supra,* is based upon the law as stated by *Pearson, C. J.,* in *Dupree v. Dupree,* 45 N. C., 164, 168: "A bequest or use limited to the children of A. passes only to such children as A. has at the time (and we will suppose that a child *en ventre* would be included); but a bequest or use limited to the children of A., after an estate to her for life, remains open, so as to take in all the children she may have at her death. And this class of cases is put on the ground, that by reason of the life estate, it does not become necessary to fix the legal ownership until the death of the taker of the first estate."

It was accordingly held in an opinion written by *Allen, J.*, that all the children who were living at the termination of the life estate had an interest as remaindermen, whether born before or after the execution of the deed. This decision, supported by the authorities therein cited, is conclusive on the question now under discussion. The judgment is

Affirmed.

C. G. CARAWAN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MONETARY DELAMAR, WINNIE DELAMAR, RANDOLPH ALLEN, LUTHER ALLEN, MAUDE ALLEN, ANNIE PHELPS AND MARIE HARRIS BAUM, v. HORTENSE BARNETT.

(Filed 9 October, 1929.)

Municipal Coporations G c—Assessments for public improvements are enforceable only against the land assessed.

An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself. The provisions of C. S., 93, as to the order of payment of debts of the deceased has no application.

APPEAL by plaintiffs from *Daniels, J.*, at April Term, 1929, of PAMLICO. Affirmed.

Z. V. Rawls for plaintiffs.
Ward & Ward for defendants.

CLARKSON, J. The only question involved is whether or not a street assessment on a particular piece of land or lot abutting on a street in a municipality, duly and properly made according to law, should be paid by the personal representative of the party whose piece of land or lot is assessed or out of the land or lot? We think the land or lot bears the burden of the street assessment.

After alleging the facts "the petitioners pray the court for its direction as to the payment of the balance due on said street assessment, which balance, to date is $167.87 with interest." *Trust Co. v. Stevenson*, 196 N. C., 29.

The will of Monetary Delamar was made and executed on 14 January, 1927. After her death, C. G. Carawan duly qualified as administrator of her last will and testament and entered upon the discharge of his duties. The necessary items of the will of Monetary Delamar for the decision of this action, are as follows:

"Item 2. I give and bequeath to my beloved daughter-in-law, Winnie Delamar my house and lot in the town of Oriental where I reside, to have and to hold during her natural life, at her death to be sold, the proceeds to go to the Methodist Orphanage, at Raleigh, N. C., etc.

"Item 3. I give and bequeath to my beloved sister Hortense Barnett all my wearing apparel and all money and all notes due me and a watch which was my mother's."

Prior to Monetary Delamar's death, there had been according to law, a street assessment on the house and lot devised to her daughter-in-law, Winnie Delamar, during her natural life and at her death to be sold and the proceeds to go to the Methodist Orphanage at Raleigh, N. C., by the town of Oriental. The assessment by the town of Oriental was confirmed on 28 March, 1927, and the amount of the assessment was $186.52. From confirmation the assessment became a lien superior to all other liens and encumbrances on the land. C. S., 2713. The testatrix, Monetary Delamar, had the option to pay same either in cash or on the 10 equal annual installment plan, as she desired. C. S., 2716. Prior to her death she paid, on 28 April, 1927, one-tenth, being $18.65, leaving a balance of $167.87 to be paid on the installment plan.

In *Morganton v. Avery,* 179 N. C., p. 551, speaking to the subject, it is said: "The assessment is not a personal liability of the defendant, and could not be collected out of her personalty by execution. It is a liability created solely by statute, and does not arise *ex contractu.* It is not a personal liability of the owner of the land to be collected by execution, it is a statutory charge upon the land itself, and must be collected by proceedings *in rem* in a court having equitable jurisdiction unless some other legal method is provided by the statute. If the land benefited is insufficient in value to pay the assessment in full, the remainder cannot be collected out of the other estate of the landowner. *Canal Co. v. Whitley,* 172 N. C., 102; *Commissioners v. Sparks, post* (179 N. C.), 581; *Raleigh v. Peace,* 110 N. C., 33." *Pate v. Banks,* 178 N. C., 139; assessment not collected out of other property of delinquent, see C. S., 5362.

In *R. R. v. Ahoskie,* 192 N. C., at pp. 259-60, it is said: "An assessment 'as distinguished from other kinds of taxation, are those special and local impositions upon the property in the immediate vicinity of municipal improvements which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom.' (Black's Law Dictionary); *Raleigh v. Peace,* 110 N. C., 32." *Goode v. Asheville,* 193 N. C., 134; *Drainage District v. Cahoon,* 193 N. C., 326.

In *Coble v. Dick,* 194 N. C., 732, it is held—that the assessment is an encumbrance as contemplated or included in the warranty in a deed containing full covenants and warranties against all encumbrances whatsoever.

A different rule applies in drainage assessments, premised on the language of the different statutes.

In *Taylor v. Commissioners,* 176 N. C., 217, this Court held: "The drainage tax becomes a lien, just as the benefits accrue, *i. e.,* annually. . . . It is a lien *in rem,* accruing annually and resting upon the land into whosesoever hands it may be at that time." *Branch v. Saunders,* 195 N. C., at p. 178.

C. S., 93, order of payment of debts of the decedent, has no application. The classes under that section apply to certain taxes and dues to the United States and State of North Carolina and debts *ex contractu,* not assessments. C. S., 93, *supra,* was passed at session of the General Assembly 1868-69. See chap. 113, sec. 24. The local improvement act, C. S., 2703, *et seq.,* was passed at session of the General Assembly, 1915, chap. 56.

The court below rendered the following judgment: "It is thereupon considered by the court, and adjudged from the facts so found that the part of the estate of the testatrix bequeathed to the defendant is not liable for any part of the unpaid assessment made against the lands devised by item 2 to the plaintiff, Winnie Delamar, for life and to the Methodist Orphanage at Raleigh in remainder, and that the defendant go without day and recover of the plaintiffs and the surety for their prosecution bond, the costs to be taxed by the clerk."

We see no error in the judgment of the court below. The judgment is

Affirmed.

STATE v. F. H. CRAWFORD.

(Filed 9 October, 1929.)

Criminal Law I a—Prisoner may not waive his right to trial by jury when plea of not guilty has been entered.

Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. I, sec. 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1929, of WAKE.

Criminal indictment charging the defendant with a violation of chapter 62, Public Laws 1927, generally known as the "Bad Check Law." The defendant's plea was "not guilty."

The following is taken from the record: "It is agreed that the court should, upon the facts agreed upon by the solicitor for the State and counsel for the defendant, say whether or not the defendant was guilty, and thereupon, after considering the facts the court orders that a verdict of guilty be entered."

From a judgment, pronounced on the above finding, that the defendant pay a fine of $25.00 and the costs, he appeals, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Gulley & Gulley for defendant.

STACY, C. J. We have a number of decisions to the effect that when a defendant in a criminal prosecution, on trial in the Superior Court, enters a plea of "not guilty" to the charge preferred against him, he may not thereafter, without changing his plea, waive his constitutional right of trial by jury. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *S. v. Rogers,* 162 N. C., 656, 78 S. E., 293. And this applies to misdemeanors as well as to felonies. *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394.

Special verdicts are permissible in criminal cases, but when such procedure is had, all the essential facts must be found by a jury. *S. v. Allen,* 166 N. C., 265, 80 S. E., 1075. They may not be referred to the judge for decision even by the consent of the accused or his counsel. *S. v. Holt,* 90 N. C., 749; *S. v. Stewart,* 89 N. C., 563. The parties are not permitted to change the policy of the law and substitute a new method of trial in criminal prosecutions for that of trial by jury as provided by the Constitution: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal." Const., Art. I, sec. 13. See, also, *S. v. Beasley,* 196 N. C., 797, 147 S. E., 301.

The case will be remanded to the Superior Court for trial by a jury as the law provides; none has yet been had.

Error.

C. W. SEARS ET AL. v. MRS. ALICE S. BRASWELL ET AL.

(Filed 9 October, 1929.)

1. **Lost or Destroyed Instruments A a—Execution of lost instrument may be proven by ancient documents.**

   Where in an action to recover lands the plaintiffs introduce certain ancient deeds in order to show a common source of title, and it is claimed by the defendants that the deceased's common source of title made a contract to convey the lands to the one under whom they claim upon the payment by him of certain notes for the purchase price, and that this contract had been lost and could not be found after due diligence, and the defendants introduced an inventory of the administrator of the deceased and relies upon such inventory and the recitations in the deeds introduced by the plaintiffs: *Held*, the deeds and inventory so introduced, made *ante litem motam* and against the interest of the original owner, which tend to establish the contract to convey under which the defendants claim, are competent evidence of the execution of such contract and the payment of the consideration thereunder under the ancient document rule, and the plaintiffs are not entitled to have such evidence restricted to the purpose of showing a common source of title.

2. **Ejectment C b—A defective deed is competent evidence of an equitable interest in lands.**

   The recitations in a deed made by the administrator of the deceased's common source of title, that the grantee therein had paid the full purchase price, though the deed is void because of the lack of proper registration under the provision of our statute, C. S., 91, it is competent in evidence to show an equitable title in the grantee therein.

3. **Limitations of Actions A a—Where one has possession and equitable and legal titles to land he is not barred by statute of limitations or laches.**

   Where the purchase price in a contract to convey lands has been paid in accordance with its provisions, the purchaser has the equitable title which merges with the legal title, and the vendor and those claiming under him are merely naked trustees, and when the purchaser has been in continued peaceful possession from that time neither the statute of limitations nor laches will bar his right to have the claim of the devisees of the vendor removed as a cloud upon his title.

4. **Estates C b—Upon the payment of the purchase price the legal and equitable titles merge in the purchaser.**

   Upon the payment of the purchase price of certain land according to the terms of a contract to convey it, the legal and equitable titles merge in the purchaser.

5. **Estates A b—An equitable estate is descendible and alienable.**

   An equitable estate in lands is descendible and alienable in the same manner as legal titles.

6. **Same—Equitable rights are not abolished by abolition of distinction between suits and actions.**

Under our Constitution equitable rights are not destroyed, but are administered in one court, though the distinction between actions at law and suits in equity is abolished.

7. **Quieting Title A b—Suit to remove cloud on title may be maintained in counterclaim.**

The defendant in an action to recover lands may maintain a counterclaim and ask that the plaintiff's claim be removed as a cloud on his title.

APPEAL by plaintiffs from *Small, J.*, and a jury, at February Term, 1929, of NASH. No error.

Material Facts: In the course of the trial it was admitted of record by all parties:

(a) The land in controversy is the identical tract of land described in the deed from Robert D. McIlwaine and others to Wells Draughan, recorded in Book 26, page 559, Nash County registry, and described in the seventh item of the will of Wells Draughan, recorded in Will Book 9, page 277, of the clerk's office in Nash County, and is the same land as described in the deed from James W. Draughan, executor, to Richard H. Jones, recorded in Book 28, page 246, Nash registry, and in deeds from Richard H. Jones and wife, to Thomas P. Braswell, Book 28, page 11, and to H. E. Odom, Book 26, page 602, and from H. E. Odom, trustee, to Thomas P. Braswell, Book 38, page 46, of Nash County registry.

(b) That Thomas Sears, mentioned in the seventh item of the will of Wells Draughan above referred to, died on the .... day of April, 1926, never having married and never having had any lawful issue or heir of his body.

(c) That the plaintiffs in this action are all surviving heirs of Delphia Sears, deceased.

(d) That the interest of Thomas P. Braswell in the above described land passed by his will, recorded in the clerk's office of Nash County, to his three sons, M. C., M. R., and J. C. Braswell, and that by deed of M. R. and J. C. Braswell to M. C. Braswell, 140 acres of said land was conveyed, and the remaining 45 acres continued to be held in common; that upon the death of M. C. Braswell, intestate, in 1922, his interest in all the aforesaid land, the entire 185 acres, descended to the defendants, Vivian Braswell, Mattie May Gorham, Alice Bryan Braswell, and Elizabeth Braswell, subject to the dower of Mrs. Alice S. Braswell, widow of M. C. Braswell, deceased, the defendants in this action.

Upon evidence introduced by both sides, the following issues were submitted to the jury, the first four being answered by the jury and the last two by the court, to wit:

"1. Did Wells Draughan enter into a contract in writing binding himself, his heirs and assigns, to convey the lands in question to said Richard H. Jones, as alleged in the answer? Answer: Yes.

2. Did Richard H. Jones contemporaneously with the execution of said contract execute and deliver to Wells Draughan purchase money notes for the purchase price of said land, as alleged in the answer? Answer: Yes.

3. Did Richard H. Jones subsequently pay said purchase money notes to the legal holder thereof? Answer: Yes.

4. Have defendants and those under whom they claim, been in quiet and undisturbed possession of said land since 1872 under said contract? Answer: Yes.

5. Is defendants' counterclaim to remove plaintiffs' claim as a cloud upon their title, barred by the statute of limitations? Answer: No. (Answered by the court.)

6. Are plaintiffs the owners of and entitled to possession of lands described in the complaint? Answer: No. (Answered by the court.)"

(e) The seventh item of the will of Wells Draughan is as follows: "I give and devise unto Thomas Sears child of Charles E. Sears and Delphia Sears, his heirs and assigns, a tract of land situated in Nash County on the north side of Swift Creek which I purchased of McIlwaine and Company, of Petersburg, Virginia, formerly owned by Colonel Rowland. Richard Jones now lives on said land. In case the said Thomas Sears should die without lawful heirs of the body the said tract of land shall be divided among the surviving heirs of the said Delphia Sears."

(f) Plaintiffs introduced in evidence the following:

Deed from James W. Draughan, executor, to Richard H. Jones, recorded in Book 28 at page 246, Nash County registry, which reads as follows:

"This indenture made this 13 November, A.D. 1872, between James W. Draughan, executor of Wells Draughan, deceased, of one part, and Richard H. Jones of the other part, witnesseth that whereas the late Wells Draughan gave the said Richard H. Jones an obligation binding him the said Wells Draughan his heirs, executors and administrators to execute and deliver to said Richard H. Jones, his heirs and assigns a good and fee simple deed to the following described tract of land, upon the payment to him the said Wells Draughan or his executors or administrators of three separate notes of five hundred dollars each, bearing interest from 1 January, 1870, and due respectively 1 January, 1871, 1 January, 1872, and 1 January, 1873; and whereas the said R. H. Jones has paid off and satisfied said notes: Now this indenture further witnesseth, that in consideration of the payment of said notes with interest on same to the said J. W. Draughan, executor aforesaid, he, the said James W. Draughan has this day sold and conveyed and delivered and by these presents does sell, convey and deliver to said Richard H. Jones, his heirs and assigns forever, the land above mentioned and described as follows, being situated in the county of Nash and State of North Carolina, on or near the road leading from Hilliardston to Battleboro, adjoining the lands of Dr. R. H. Marriott, E. Boddie Hilliard, the lands of late Joseph Turner and others, containing one hundred and eighty-five acres, more or less, being the land purchased by W. H. Rowland, of Jas. Turner, and by H. G. Williams of said Rowland and by A. H. Williams of said H. G. Williams, and by McIlwaine & Co. of said A. H. A. Williams, to have and to hold the same unto him the said Richard H. Jones, his heirs and assigns forever, and the said James W. Draughan, as executor aforesaid hereby warrants and defends unto said Jones and his heirs a good right and title to said land against the claims of any and all persons whatsoever.

In witness whereof the said James W. Draughan has hereunto set his hand and seal, the day and date above written.

JAMES W. DRAUGHAN, *Executor.* (Seal.)

Witness: H. G. WILLIAMS.

Nash County. In the Probate Court, 10 February, 1874.

The execution of the foregoing deed was duly proven before me by the oath of H. G. Williams, the witness thereto. Register it.

Registered 13 June, 1874.

J. P. JENKINS, *Probate Judge.*
WILLIAM T. GRIFFIN, *Register of Deeds.*"

Deed from Richard H. Jones and wife to Thos. P. Braswell, recorded in Book 28 at page 11, Nash County registry. The material parts of this deed are as follows: Dated 13 November, 1872; acknowledged 15 November, 1872; recorded 6 May, 1873. Consideration $500, containing by estimation 140 acres, more or less, and being a part of the McIlwaine tract. "The following described tract or parcel of land situate in the county of Nash, State of North Carolina, being a part of the tract purchased by said Jones of Wells Draughan, deceased, the whole of which tract was purchased by said Wells Draughan of McIlwaine." (The tract in controversy.) Contains general warranty.

Mortgage, Richard H. Jones to H. E. Odum, recorded in Book 26, at page 602, Nash County registry. The material parts of said mortgage are as follows: Dated 13 November, 1872, acknowledged 27 November, 1872, and recorded 2 January, 1873; mortgage recites: "Witnesseth, that whereas, said H. E. Odom is security for Richard H. Jones on a certain bond due James W. Draughan for the purchase of the following described tract or parcel of land given this day and due 1 January, 1874, and bearing interest from 1 January, 1873, the amount of principal of said bond being seven hundred and seventy dollars, and whereas the said Richard H. Jones and Harriet A. are desirous of securing and saving the said H. E. Odom on account of said securityship, so that he will not be loser thereby," etc.

Containing 45 acres, more or less, and being the balance of the McIlwaine tract. This description begins "The tract of land on which R. H. Jones now resides purchased by him of the late Wells Draughan with the exception of that part sold to Thos. O. Braswell this day, the part hereby conveyed and sold to said Odom being bounded as follows." The land described is part of the land in controversy.

Deed, H. E. Odom, mortgagee or trustee, to Thos. P. Braswell, Book 38, page 46, Nash County registry.

The evidence was introduced by plaintiffs to show defendants' chain of title from a common source.

Plaintiffs' counsel dictated to the record the following statement: "All of the evidence introduced showing defendants' chain of title was introduced for the purpose of showing title from common source, and that plaintiffs' title from that source is superior to defendants' title from that source, and evidence restricted to that purpose." Motion by defendants to strike from record the above statement and restrictions. Motion allowed; (1) plaintiffs except and assign error.

Defendants' evidence, in part:

Defendants introduced in evidence a certified copy from Edgecombe Superior Court, of the qualification of James W. Draughan, executor of Wells Draughan, deceased.

"TARBORO, N. C., 24 September, 1872.

In the Matter of the Will of the late Wells Draughan of this county:

The last will and testament of the late Wells Draughan of this county having this day been admitted to probate in this county, and James W. Draughan having applied for leave to qualify as one of the executors mentioned therein—

It is ordered by the court that he have leave to do so . . . and thereupon the said James W. Draughan did by taking and subscribing to the oath prescribed by law for the qualification of executors . . . and letters testamentary are issued accordingly.

24 September, 1872.

J. NORFLEET, *Judge of Probate.*"

Defendants offered in evidence the following instrument, to which plaintiffs objected, not on account of form, but on account of substance; objection overruled, (2) plaintiffs except and assign error.

Instrument admitted in evidence reads as follows:

"Inventory of land, belonging to Wells Draughan, deceased. (There are nine tracts of land mentioned other than the one below, of which no description or number of acres are requested.)

(180) One hundred and eighty acres in Nash County bought of McIlwaine & Company, Petersburg, Va., given by will to Thomas Sears, son of Charles E. Sears, afterwards sold to Richard Jones on condition of the money being paid to Thomas Sears or his guardian. Note endorsed to Thomas Sears. JAMES W. DRAUGHAN.

Sworn to and subscribed before me, by Jas. W. Draughan, 3 April, 1875.

JOHN NORFLEET, *Judge of Probate.*

Book of Inventories and Accounts, 1867-1881, Edgecombe County, office clerk Superior Court."

Defendants admit in open court that plaintiffs are the only lawful heirs of Delphia Sears; that the defendants do not claim title to the lands in controversy by adverse possession against the plaintiffs, but under the alleged contract between Wells Draughan and Richard H. Jones followed by payment of the purchase price specified in said contract and possession thereunder; it is further admitted that Tom Sears mentioned in paragraph 7 of the will of Wells Draughan died without leaving lawful heirs of his body; never had any children. The foregoing admissions are made with the understanding that the court in rendering its judgment shall consider said admissions as of the same effect and force as if found by a jury upon proper issues submitted.

The defendants relied upon the following evidence:

(a) The recitals in the various deeds pleaded and introduced by the plaintiffs, together with a record of the inventory of Wells Draughan, by executor, filed in Edgecombe County Superior Court, all more than thirty years old and treated as ancient documents.

(b) Continuous possession of the land consistent with their claim under the contract and consistent with the existence of the contract.

(c) The loss of the original contract and the diligent search for it, the exhaustion of every reasonable effort to locate it, and their inability to produce it. No notice was served on the plaintiffs to produce it because in their reply to the amended answer they denied the existence of it. No demand was ever made on defendants for the possession of the land until after the death of Thos. Sears, which was in April, 1926.

All the exceptions of the plaintiffs relate to the competency of the evidence upon which the defendants relied and upon the legal effect thereof. Among the allegations in defendants' answer, they say: "That the plaintiffs, as executory devisees under the will of Wells Draughan, are asserting a claim of title to the land herein described; that the claim of the plaintiffs constitutes a cloud upon the title of the lands in question, which are now and have been for the past fifty-six years in possession of these defendants and those under whom they claim, adversely to the plaintiffs and those under whom they claim; that the defendants are entitled to a conveyance of the land from the plaintiffs." And for a further reply to the affirmative defense set up by the defendants, the plaintiffs allege:

1. That the defendants' cause of action, if any they have, growing out of the alleged contract between Wells Draughan and Richard H. Jones, accrued more than ten years prior to the commencement of this action and the filing of the defendants' pleading, and therefore barred by the ten-year statute of limitations, which is hereby specifically pleaded in bar of the defendants' right to enforce the same, or to recover upon it.

2. That the defendants' cause of action, if any they have, growing out of the alleged contract between Wells Draughan and Richard H. Jones, accrued more than three years prior to the commencement of this action, and the filing and pleading, and the same is therefore barred by the three-year statute of limitations, which said statute is hereby pleaded in bar of their right to enforce the same, or to recover anything by reason thereof.

3. That if there was any contract and any trust created as alleged by the defendants, which is specifically denied by the plaintiffs, the defendants, and all of them, are guilty of laches and unreasonable delay in enforcing the said trust and by their conduct in this respect they are now estopped to assert any rights under such alleged contract and trust.

Other material facts will be set forth in the opinion.

Cooley & Bone and L. L. Davenport for plaintiffs.
J. P. Bunn and Battle & Winslow for defendants.

CLARKSON, J. From the admission of defendants, the plaintiffs were entitled to the possession of the land in controversy unless the defendants' contentions were correct, and there was competent evidence to support them.

The main contentions of plaintiffs, as we interpret them, are:

(1) "All the evidence introduced showing defendants' chain of title was introduced for the purpose of showing title from common source, and that plaintiffs' title from that source is superior to the defendants' title

from that source, and evidence restricted to that purpose." The court below refused to restrict the evidence, and in this we think there was no error.

(2) The contention of plaintiffs was also to the effect that the inventory of James W. Draughan, executor of Wells Draughan, introduced by defendants was incompetent as bearing on the written contract as set up by defendants by Wells Draughan to Richard H. Jones and his heirs and assigns; that upon payment of the purchase money notes to Thomas Sears, a conveyance would be made to Richard H. Jones and his heirs and assigns. This evidence was admitted by the court below, and in this we think there was no error.

The inventory was filed by the executor under the provisions of chapter 113, Laws 1868, which required the executor under oath within three months to return to the clerk an inventory of the real estate, etc.

The recitals in the conveyances, and other evidence, tend to show: That Wells Draughan, who owned the land in controversy, made a will which bears date of 17 February, 1870 (codicils 8 March, 1870, and 11 May, 1871). Said will and codicils were duly probated 24 September, 1872.

The seventh item of his will devised the land in controversy to Thomas Sears and his heirs and assigns, but "in case the said Thomas Sears should die without a lawful heir of the body, the said tract of land shall be divided among the surviving heirs of the said Delphia Sears." Thomas Sears died without lawful heirs in April, 1926. The plaintiffs in this action are the surviving heirs of Delphia Sears. The defendants admit that the deed of James W. Draughan, the executor of Wells Draughan, conveying the land in controversy is inoperative, as it purports to do, to pass title to Richard H. Jones and his heirs and assigns. The bond for title was not recorded. C. S., 91; *Taylor v. Hargrove,* 101 N. C., 145.

That a written contract or bond for title, as required by law, was made by Wells Draughan before he died to convey the land in controversy to Richard H. Jones and his heirs and assigns upon the payment of certain purchase-money notes, which were to be paid by Jones to Thomas Sears, who, under section 7 of the will, as above set forth, would have had an interest in the land in controversy. That there was an ademp-
uncn of the legacy *(King v. Sellars,* 194 N. C., 533), by the bond for
(c,being made by Wells Draughan before he died and after his will
exhausnade, to Richard H. Jones and the notes were endorsed to the
produce n, Thomas Sears, mentioned in Item 7 of the will in lieu of
in their ry. That the notes came into the hands of the executor, who
No demanhem and turned the proceeds over to Thomas Sears and made
until after t

the deed set forth in the statement of facts which is inoperative as the written contract or bond for title was never recorded as required by law. That Richard H. Jones, and those who claim under him, have been in the quiet and undisturbed possession of the land in controversy since 1872 under the written contract or bond for title. That diligent search was made for the written contract or bond for title, which could not be found. The defendants' counterclaim is to remove plaintiffs' claim as a cloud upon defendants' title, which is not barred by the statute of limitations, and the plaintiffs are not the owners and entitled to the land in controversy.

The jury found that the contract or bond for title was made as the defendants alleged, that the notes were executed as the defendants allege; that the purchase money was paid to the legal holder of the notes as the defendants alleged; that the defendants have been in quiet and undisturbed possession of the land since 1872 under the contract. On these findings the court below found that the defendants' counterclaim to remove cloud on title was not barred by the statute of limitations, and that the plaintiffs were not the owners of the land.

The principle is well settled in this State and elsewhere that where both parties claim title under the same grantor, it is sufficient to prove a title derived from him without proving his title, as neither party can deny such title. The plaintiffs, in attempting to prove their own title, and in order to connect defendants' title with a common source, introduced the James W. Draughan, executor, deed and the other conveyances set forth in the record, which contained certain recitals. Plaintiffs contend that the evidence should be restricted.

We said in *Cook v. Sink,* 190 N. C., at p. 625: "They cannot 'blow hot and cold in the same breath.' Any other view would be inequitable and unconscionable. Plaintiff or the other devisees cannot take inconsistent positions. 'Upon the principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped, by claiming under it, to attack any of its provisions. . . . So, also, one who accepts the terms of a deed or other contract must accept the same as a whole; one cannot accept part and reject the rest.' Bigelow on Estoppel, 6 ed., p. 744; *Fort v. Allen,* 110 N. C., 191; *Chard v. Warren,* 122 N. C., 86; *Freeman v. Ramsey,* 189 N. C., 790"; *Adams v. Wilson,* 191 N. C., at p. 395.

The deed from James W. Draughan, executor, dated 13 November, 1872, to Richard H. Jones, and his heirs and assigns, introduced by plaintiffs, have these recitals: "Witnesseth, that whereas the late Wells Draughan gave the said Richard H. Jones an obligation binding him, the said Wells Draughan, his heirs, executors and administrators to execute and deliver to said Richard H. Jones, his heirs and assigns a good and fee-simple deed to the following described tract of land, upon the payment to him the said Wells Draughan or his executor or administrator of three separate notes of five hundred dollars each, bearing interest from 1 January, 1870, and due respectively 1 January, 1871, 1 January, 1872, 1 January, 1873; and whereas the said R. H. Jones has paid off and satisfied said notes."

The recitals in the other conveyances introduced by plaintiffs, speak of the land "being a part of the tract purchased by said Jones of Wells Draughan, deceased," and "the tract of land on which R. H. Jones now resides, purchased by him of the late Wells Draughan, with the exception of the part sold to Thomas P. Braswell this day."

Item 7 of the will of Wells Draughan says "Richard Jones now lives on said land."

We will not discuss whether the recitals in the conveyance introduced by plaintiffs to connect defendants' title with a common source was an estoppel as to them, as defendants made certain admissions of record and the action was tried out on the theory that the recitals were some competent evidence in ancient documents, and the competency of these recitals seems to be the crux of this action.

We think that the recitals in these deeds and the inventory return competent evidence under the ancient document rule. *Davis v. Higgins,* 91 N. C., 382; *Sledge v. Elliott,* 116 N. C., 712; *Nicholson v. Lumber Co.,* 156 N. C., 59; *Thompson v. Buchanan,* 195 N. C., 155; *Davis v. Gaines,* 104 U. S., 386; *Wilson v. Snow,* 228 U. S., 217, 6 A. L. R., 1445 *et seq.*

In *Buchanan's case, supra,* at p. 161, it is said: "The hearsay rule gives way to the ancient (document) doctrine rule and is admissible ordinarily at least as prima facie evidence of the truth of the contents."

"Even if it be conceded that the deed was not of itself a valid conveyance, which the executor was authorized to make, the recitals were admissible to establish the truth of the facts recited. The deed was ancient; the parties to the transaction were dead; the recitals were against the interest of the party making them as he was one of the heirs of John S. Sydnor, and are consistent with every known fact connected with the title." *Sydnor v. Texas Savings Asso.,* 42 Tex. Civ. Ap., 138, 94 S. W., 451.

The executor's deed in the present action was void because the bond for title was not recorded. Yet the evidence discloses that Richard H. Jones paid the purchase price. We think the principle laid down in *Thompson v. Lumber Co.,* 168 N. C., at p. 229, analogous: "The deed to Prichard, which was objected to, is void, as contended by the defendant, because the grantee named was dead at the time of its execution *(Neal v. Nelson,* 117 N. C., 406), but upon proof of payment of the purchase price bid at the sale an equitable estate would be vested in the heirs of the purchaser, and it is well settled in this State that an action may be maintained on an equitable title *(Condry v. Cheshire,* 88 N. C., 375; *Brown v. Hutchinson,* 155 N. C., 207); and in our opinion there was circumstantial evidence of payment." See *Cedar Works v. Shepard,* 181 N. C., 13. Defendants in this action are the successors in title from Richard H. Jones.

In the present action the alleged ancient original bond for title was lost. Under the evidence introduced by defendants, which we think competent, diligent search was made as required by law. "To show a writing is lost or destroyed, in general terms, without showing a reasonable search or inquiry for it, has never been regarded as sufficient to admit secondary or parol evidence of its contents. The best evidence is the paper-writing, when a matter is required to be put in writing, or the paper-writing is in issue or the subject of the controversy. *McKesson v. Smart,* 108 N. C., 17; *Avery v. Stewart,* 134 N. C., 287; *Sermons v. Allen,* 184 N. C., p. 127; *Chair Co. v. Crawford,* 193 N. C., 531. The exception to the rule is where the contents of the writing is collateral to the controversy or issue. *Herring v. Ipock,* 187 N. C., p. 459." *Harris v. Singletary,* 193 N. C., at pp. 586-7.

Plaintiffs' third contention is that defendants are barred by the statute of limitations, ten years, etc., and laches. We cannot so hold. Defendants contend that Richard H. Jones, through whom they claim, had a written contract or bond for title, as required by law, from Wells Draughan; that upon the payment of certain notes a deed in fee simple was to be made him for the land in controversy. Under the bond for title in 1872, Jones went into possession of the land in controversy and the relationship of vendor and vendee existed, and the defendants claim title through him. When the notes were paid, he and those claiming under him became the equitable owners of the land and the devisees of Wells Draughan are mere naked trustees with no beneficial interest, and the claim of plaintiff is a cloud on defendants' title. We think defendants' contentions correct.

The principle is thus enunciated in *Jennison v. Leonard,* 21 Wall, 302 (22 Law Ed., 539): "This is one of the sales of real estate by contract, so common in this country, in which the title remains in the vendor and the possession passes to the vendee. The legal title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase, his equitable interest increases, and when the contract price is fully paid, the entire title is equitably vested in him, and he may compel a conveyance of the legal title by the vendor, his heirs or assigns. The vendor is a trustee of the legal title of the vendee to the extent of his payment."

"The equitable estate of the vendee is alienable, descendible, and devisable as real estate held by a legal title." *Lewis v. Hawkins,* 23 Wall, 119, 23 Law Ed., p. 113.

In *Cherry v. Power Co.,* 142 N. C., at p. 410, it is said: "As the purpose of the trust was fully accomplished, the necessity and reason for keeping the legal and equitable estates separate no longer existed, and by operation of the statute of uses, aptly called 'parliamentary magic,' the use becomes executed and the legal estate vested in the plaintiffs. *McKenzie v. Sumner,* 114 N. C., 425; *Perkins v. Brinkley,* 133 N. C., 154."

Under our Constitution, the distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished, but this did not destroy equitable rights and remedies nor merge legal and equitable rights. In one action the legal and equitable rights of the parties can be tried out. *Waters v. Garris,* 188 N. C., 305.

Under C. S., 1743, defendants pray that their title be quieted. In *Plotkin v. Merchants Bank, etc., Co.,* 188 N. C., 711, 715, the Court said: "*Walker, J.,* in *Christman v. Hilliard,* 167 N. C., 4, speaking of the statute, says: 'The beneficial purpose of this statute is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion.'" *Johnson v. Fry,* 195 N. C., 832.

From a careful inspection of the record, the numerous exceptions and assignments of error made by plaintiffs cannot be sustained. It appears to us that the action was unusually well tried by the learned judge who presided and the attorneys for the litigants.

No error.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK v. THE FIRST AND CITIZENS NATIONAL BANK OF ELIZABETH CITY, N. C., ET AL.

(Filed 9 October, 1929.)

1. **Trial F a—Issues submitted in this case held sufficient.**

   Where the issues submitted to the jury fully present all phases of the controversy and fully determine the rights of the parties, they are sufficient, and the court's refusal to submit other issues tendered will not be held for reversible error.

2. **Bills and Notes I a—Under the facts of this case the check sued on was competent evidence.**

   In an action to recover of the drawee bank for the payment of a check when it was not properly endorsed, and the question of whether the endorsement was proper, is the sole matter at issue under the pleadings and admissions upon the trial, the introduction of the check in evidence by the plaintiff showing payment and endorsements, is competent over the objection of the drawee bank.

3. **Bills and Notes B b—Endorsement in this case held invalid.**

Where the plaintiff has agreed to lend money to a borrower upon security of a deed of trust on lands, and has sent its check payable to the borrower and to the attorney in order that the title to the lands be unencumbered before the money should pass to the borrower, an endorsement by the attorney for himself and as agent, for the borrower, is an improper endorsement for the borrower.

4. **Bills and Notes I a—Upon the payment of improperly endorsed check the drawee bank is liable to the drawer.**

Where the drawee bank has received through the course of collection from other banks and paid a check with an improper or unauthorized endorsement which has not been subsequently ratified by the payee of the check, the relation of debtor and creditor exists between the drawer of the check and its drawee bank, and the drawee bank is liable to the drawer of the check upon the unauthorized payment.

5. **Same—Drawee bank has burden of proving proper payment.**

The obligation of a bank to pay the check of a depositor from the moneys on deposit rests upon the relationship of debtor and creditor, the bank being required to make payment to the drawer's payee upon proper presentment and endorsement of the check, with the burden of proof on the drawee bank to show a proper payment when this is at issue, and in the absence of evidence thereof its motion for judgment as of nonsuit will be denied.

6. **Bills and Notes I b—Banks in course of collection are not liable to drawer upon wrongful payment of check by drawee bank.**

Where banks in the course of collection of a check have successively guaranteed all prior endorsements of a check, each of such banks is responsible only to its immediate endorsee upon an invalid endorsement by the payee under the separate contracts or agreements among themselves, and the drawer of the check is not entitled to a judgment against them all for the amount of the loss.

APPEAL by defendants other than James Squire, from *Devin, J.,* at December Term, 1928, of PASQUOTANK. No error in trial; remanded for modification of judgment.

Civil action by the drawer to recover of the drawee bank, the amount of its check, paid by said bank without the valid endorsement of the payees, and charged to the account of the drawer; and also to recover said amount of the endorsers of said check who had guaranteed an endorsement on the check, purporting to be the endorsement of the payees, but which was invalid.

On 22 January, 1927, plaintiff issued its check for the sum of $6,185.86, drawn on the defendant, the First and Citizens National

Bank of Elizabeth City, N. C., and payable to the order of "E. A. Matthews, atty., and James Squire, bwr."

Prior to said date plaintiff had agreed to lend to the said James Squire the amount of said check, upon the execution by him of a note for said amount and a deed of trust, conveying to a trustee certain land in Halifax County, North Carolina, to secure the payment of said note. The note and deed of trust had been executed by the said James Squire, and both had been delivered to plaintiff by him, in accordance with said agreement. A certificate signed by E. A. Matthews, an attorney at law, residing at Roanoke Rapids, N. C., with respect to the title of the said James Squire to said land, accompanied said note and deed of trust, when they were delivered to the plaintiff. This certificate was required by plaintiff before its acceptance of the note and deed of trust. Upon its receipt of the note, the deed of trust, and the certificate as to the title to the land, plaintiff issued its check payable to the order of both E. A. Matthews, as attorney, and James Squire, as borrower, in order that all claims and liens on the land should be satisfied and discharged by the said James Squire, the borrower, under the supervision of the said E. A. Matthews, as attorney, before the proceeds of the check were paid to the said James Squire. By pursuing this method of completing the transaction with respect to the loan, plaintiff was assured that its note would be secured by an unencumbered title to the land conveyed by the deed of trust. The entire transaction between James Squire as borrower, and the plaintiff as lender of the money, was conducted by mail.

After the issuance of said check, the same was subsequently presented for payment to the defendant, the First and Citizens National Bank of Elizabeth City, N. C., the drawee bank, by the defendant, Federal Reserve Bank of Richmond, Va., as holder under endorsements of the check by the defendants, Commercial National Bank of Raleigh, N. C., and First National Bank of Roanoke Rapids, N. C. At the date of such presentment, the check was also endorsed as follows: "E. A. Matthews, atty., James Squire, bwr., by E. A. Matthews, atty." This last endorsement was guaranteed to the drawee bank, by each of the other defendant banks.

Upon presentment of the check to it, for payment, the defendant, the First and Citizens National Bank of Elizabeth City, N. C., charged its amount to the account of plaintiff, and marked the check "paid"; the said defendant thereafter remitted said amount to the defendant, Federal Reserve Bank of Richmond, Va.; the said Federal Reserve Bank thereafter remitted said amount to the defendant, Commercial National Bank of Raleigh, N. C.; the said Commercial Bank, in its answer, admits the receipt of said amount, and alleges that it holds the same to the credit of the defendant, First National Bank of Roanoke Rapids,

N. C., or subject to the judgment in this action; the said defendant, First National Bank of Roanoke Rapids, N. C., had received the check from E. A. Matthews, and had paid to him its amount; at the date of such receipt and of such payment, the check bore the following endorsement: "E. A. Matthews, atty., James Squire, bwr., by E. A. Matthews, atty." The said check was thereafter forwarded by the said First National Bank of Roanoke Rapids, N. C., with its endorsement, and with its guarantee of all prior endorsements, to the defendant, Commercial National Bank of Raleigh, N. C., for collection. It was thereafter forwarded by the said Commercial National Bank, with its endorsement and with its guarantee of all prior endorsements, to the defendant, Federal Reserve Bank of Richmond, Va., for collection. It was thereafter forwarded by the said Federal Reserve Bank, with its endorsement and with its guarantee of all prior endorsements, to the defendant, the First and Citizens National Bank of Elizabeth City, N. C., for payment. The said defendant, the First and Citizens National Bank, relying upon the endorsements thereon, charged the check to the account of plaintiff, as drawer and remitted its amount to the defendant, Federal Reserve Bank of Richmond.

Plaintiff alleges that the endorsement on the check, purporting to be the endorsement of the payees is invalid, for that same was made without the authority of James Squire, one of the payees. The defendants deny this allegation; each alleges that said endorsement was authorized by the said James Squire, or if not, that same was subsequently ratified by him.

After the commencement of the action, James Squire was made a defendant on the motion of the defendant, First National Bank of Roanoke Rapids, N. C. In his answer, the said James Squire denied that he had authorized the endorsement of the check in his name by E. A. Matthews, as attorney; he also denied that he had ratified the said endorsement, by accepting from the said E. A. Matthews any part of the amount of the said check, or otherwise. He prays judgment only that he go without day and recover his costs. He makes no claim to the check, now in the possession of the drawer, marked "paid" by the drawee bank, or to the amount of the check paid by said drawee bank to the holder, without the valid endorsement of the payees.

No evidence was offered at the trial showing or tending to show that James Squire had authorized the endorsement of the check in his name by E. A. Matthews, as attorney, or that he had ratified said endorsement, as alleged in the answers of the defendant banks.

Each of the defendant banks, although denying its liability to plaintiff in this action, prayed judgment that in the event it should be held liable to the plaintiff, or to any of its codefendants, it recover of such of its codefendants as were endorsers, and guarantors of prior endorsements on the check, when the same was received by it, the amount which it should be required to pay on the judgment rendered against said defendant.

Issues submitted to the jury were answered as follows:

"1. Did the defendant banks pay out to others than the payees named in the check described in the complaint, and upon an unauthorized endorsement thereof, funds of the plaintiff, as alleged in the complaint? Answer: Yes.

2. Are the defendant banks indebted to the plaintiff, and if so, in what amount? Answer: $6,185.86."

Judgment was rendered on the verdict (1) that plaintiff recover of the defendants, First National Bank of Roanoke Rapids, N. C., Commercial National Bank of Raleigh, N. C., Federal Reserve Bank of Richmond, Va., and the First and Citizens National Bank of Elizabeth City, N. C., the sum of $6,185.86, with interest and costs; (2) that each of said defendant banks recover of its immediate endorser such sum as it shall be required to pay to plaintiff, or to its immediate endorsee, on account of the judgment herein against it, and in favor of the plaintiff; and (3) that the defendant, James Squire, go without day, and recover his costs to be taxed by the clerk, against the defendant, First National Bank of Roanoke Rapids, N. C.

From this judgment all the defendants, except James Squire, appealed to the Supreme Court.

Worth & Horner and Thompson & Wilson for plaintiff.

Ehringhaus & Hall for The First and Citizens National Bank of Elizabeth City, N. C.

M. G. Wallace for Federal Reserve Bank of Richmond, Va.

C. A. Gosney for Commercial National Bank of Raleigh, N. C.

Geo. C. Green and McMullan & LeRoy for First National Bank of Roanoke Rapids, N. C.

CONNOR, J. We find no error in the trial of this action for which either of the appellants is entitled to a new trial.

The objection of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., to the introduction in evidence of the check, with endorsements thereon, and with the perforation showing that the check had been paid by said defendant, was properly overruled. The exception to the ruling of the court on this objection is not sustained. The check was competent as evidence by reason of admissions made by the defendant in its answer. These admissions were offered as evidence against this defendant by the plaintiff. Neither of the other defendants objected to the introduction of the check. The check and the admissions tended to sustain the allegations of the complaint, relied upon by plaintiff as constituting its cause of action against the defendant, the First and Citizens National Bank of Elizabeth City, N. C.

There was no error in the refusal of the court to submit to the jury the issues tendered by the defendants. Plaintiff did not allege in its complaint, or contend at the trial that it was the owner of the check, nor is its cause of action as set out in the complaint founded upon such allegation or contention.

Plaintiff's cause of action against the defendant, the First and Citizens National Bank of Elizabeth City, N. C., is founded upon its relationship to said defendant as a depositor; it alleges that said defendant has on deposit to its credit and subject to its check, a sum of money which said defendant refuses to pay to it or to its order; that said defendant denies liability to plaintiff for said sum of money, upon its contention that it has paid out said sum on a check drawn by plaintiff on said defendant. Plaintiff controverts this contention, and demands judgment that it recover of said defendant the amount of its deposit.

Plaintiff's cause of action against the other defendants is founded upon the guarantee by each of said defendants of an endorsement appearing on the check, purporting to be the valid endorsement of the payees, but which plaintiff contends is invalid. Plaintiff contends that each of these defendants by reason of its endorsement and guarantee of the void endorsement in the names of the payees is liable to it, as drawer of the check, for the amount which the drawee bank has, without its authority, charged to its account.

It is true that there are allegations in the complaint which are appropriate to a cause of action for the conversion of money belonging to plaintiff. Plaintiff did not rely upon these allegations for its recovery in this action; it offered no evidence at the trial to sustain them. Its recovery, at least of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., is not dependent upon the truth of these allegations. It has recovered of said defendant upon a cause of action founded upon its contractual rights as a depositor of said defendant. It is immaterial whether the cause of action set out in the complaint be classified as a cause of action on a contract, or as a cause of action on a tort. *Estates v. Bank,* 171 N. C., 579, 88 S. E., 783. There are allegations in the complaint which construed liberally and with a view to substantial justice (C. S., 535), are sufficient to constitute a cause of action on contract. Other allegations may be regarded as surplusage. Exceptions to the refusal of the court to submit issues tendered by defendants are not sustained.

The issues submitted by the court to the jury arise upon the pleadings. They are sufficient in form and substance for the submission to the jury, for its determination, of the contentions of the parties with respect to the essential question in controversy, to wit: Whether the amount charged to the account of plaintiff, as a depositor of the drawee bank, was paid by said bank to the payees, or to a holder claiming title to the check under a valid endorsement by the payees? It has been held by this Court that where issues submitted by the court to the jury are sufficient in form and substance to present all phases of the controversy between the parties, there is no ground for exception to the same. *Bailey v. Hassell,* 184 N. C., 450, 115 S. E., 166; *Potato Co. v. Jeanette,* 174 N. C., 236, 93 S. E., 795; *Power Co. v. Power Co.,* 171 N. C., 248, 88 S. E., 349. A new trial will not ordinarily be granted by this Court where it appears that the issues submitted to the jury presented for their determination the essential questions in controversy, although other questions not determinative of liability are also included in the issues. The liability of the defendants in this case to the plaintiff and to each other is dependent solely upon the answer to the question involved in the first issue, to wit: Was the endorsement on the check, purporting to have been made by the payees, authorized or ratified by James Squire, one of the payees named in the check, to whose order alone the check was payable? It is conceded in the answer of each of the defendants that if plaintiff is entitled to recover in this action of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., the drawee bank, then each of the other defendants, by reason of its endorsement of the check, and of its guarantee of all prior endorsements thereon, is liable to the drawee bank, to its immediate endorsee, and to subsequent holders, under said endorsements, for such amount as plaintiff shall recover of the drawee bank, who paid out such amount upon the faith of said endorsements and guarantees. It does not appear that either of the defendants have any valid ground for its exception to the issues submitted to and answered by the jury.

There was no error in the refusal of the court to dismiss the action, as upon nonsuit, at the close of the evidence, or in the instructions of the court to the jury. Neither of defendants offered evidence in support of the allegations of its answer. Each relied upon its contention that the burden was on the plaintiff to prove that the endorsement on the check of the name of James Squire, one of the payees, by E. A. Matthews, atty., was neither authorized nor ratified by the said James Squire. This contention cannot be sustained; upon the admissions in the pleadings and the facts shown by the evidence offered by plaintiff, the burden was on the defendants to offer evidence to show that the endorsement was either authorized by James Squire, or ratified by him, as alleged in their answers. *Bell v. Bank,* 196 N. C., 233, 145 S. E., 241.

It is a well settled principle that the relationship between a depositor and his bank, with respect to his general deposit, is that of a creditor and debtor. It has been so held by this Court. *Graham v. Warehouse,* 189 N. C., 533, 127 S. E., 540; *Reid v. Bank,* 159 N. C., 99, 74 S. E., 746; *Boyden v. Bank,* 65 N. C., 13. Where money has been deposited in a bank, on general deposit, the bank impliedly undertakes to pay out said money only to the depositor himself, or to such person as he may direct payment to be made. *Goodloe v. Bank,* 183 N. C., 315, 111 S. E., 516; *McKaughan v. Bank,* 182 N. C., 543, 109 S. E., 355. The deposit, in the absence of a special agreement to the contrary, creates a debt; this debt can be discharged only by a payment or by payments made to the creditor, or to his order. The burden is on the bank as debtor, to show payment to the depositor as creditor or to a person or persons to whom the depositor has authorized payment to be made. *Harmon v. Taylor,* 98 N. C., 341, 4 S. E., 510.

Where it is admitted or established by evidence that at a certain date, a depositor had on deposit with his bank, to his credit and subject to his check, a sum of money and the bank contends that it has been discharged of liability by reason of such deposit, either in whole or in part, by the subsequent payment of a check drawn by said depositor on said bank, the burden is on the bank to show that the amount of the check was paid to the payee named in the check, or if the check is payable to bearer, that said amount was paid to a holder in possession of the check, or if the check is payable to the order of the payee, that said amount was paid to a holder claiming title to the check under a valid endorsement of the check by the payee. In the absence of evidence showing such payment, the bank remains liable to the depositor, notwithstanding payment of the amount of the check to a stranger and notwithstanding the check has been marked "paid" by the bank, and charged on its books to the account of the drawer.

This principle is recognized in *Bell v. Bank,* 196 N. C., 233, 145 S. E., 241. In that case, however, it was held that the drawer was not entitled to recover of the drawee bank, for the reason that although the amount of the check payable to the order of the payee was paid to a holder without the endorsement of the payee, said amount had been paid subsequently to the payee by such holder, as the drawer of the check intended. The plaintiff had therefore suffered no loss, for the amount of the check had been applied as a payment on her indebtedness to the payee.

In *Dawson v. Bank,* 196 N. C., 134, 144 S. E., 833, the payees and not the drawers were plaintiffs. It was held that upon the facts which the evidence tended to show in that case the plaintiffs were entitled to recover of the drawee bank, the amount of the check payable to their order and paid by the drawee bank to a holder without their endorsement. There the drawers by special agreement had authorized the drawee bank to pay their checks, although drawn payable to order, as if they had been drawn payable to bearer. In the instant case the payees make no claim on the drawee bank for the amount of the check, which the drawee bank has paid to a holder without their valid endorsement. By virtue of the provisions of C. S., 3022, the endorsement of the check by one of the payees, in his own name, and in the name of the other payee, without the authority of the latter, was invalid and passed no title to the check to the endorsee or to subsequent holders. Payment of the check to a holder, without the valid endorsement of the payees, did not discharge the drawee bank from liability to the drawer for its deposit.

Upon the verdict in this case, it was properly adjudged that plaintiff recover of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., the amount of its check, charged to its account by said defendant. Said amount was not paid to the payees, or to their order, as plaintiff directed when it issued its check.

Plaintiff is not entitled, however, to judgment against the other defendants. These defendants sustained no contractual relation to the plaintiff, by reason of which they are liable to plaintiff upon the verdict in this action. Endorsers of a check are liable only to their immediate endorsees, to subsequent holders, and to the drawee bank. The judgment should be modified to the end that the drawee bank shall recover of each of the other defendants the amount which it shall be required to pay to plaintiff in satisfaction of its judgment; and to the end that each of the defendants may recover such amount as it shall be required to pay by reason of its endorsement of the check, and its guarantee of prior endorsements thereon, of its codefendants, prior endorsers of said check. In order that the judgment may be modified in accordance with this opinion, the action is remanded to the Superior Court of Pasquotank County.

No error.

CLAYTON BANKING COMPANY v. GEO. C. GREEN, TRUSTEE, JOE E. TALTON, MRS. LENA TALTON, W. B. JOHNSON AND ETHEL TALTON BRANNON.

(Filed 9 October, 1929.)

Mortgages H o—Where under agreement with clerk the deposit for an upset bid is mailed, the deposit is made as of time of mailing.

While the clerk of the Superior Court is without authority to order a resale of lands foreclosed under mortgage without an increase bid filed with him under the provisions of C. S., 2591, and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect the mortgagor, and when within the statutory time limit the offerer has communicated with the clerk of the court by phone and offered to come from an adjacent town and make a sufficient deposit, and is informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check is accordingly mailed, a substantial compliance with the statute has been made, though the check was received by the clerk after the expiration of the time limit of the statute.

CIVIL ACTION, before *Midyette, J.*, at June Term, 1929, of JOHNSTON.

The trial judge found the facts and such findings may be summarized as follows:

On 6 October, 1921, Joseph S. Talton executed and delivered to the defendant, George C. Green, trustee, a deed of trust to secure a note or notes payable to the Metropolitan Life Insurance Company, which deed of trust was duly recorded. Thereafter said notes were duly transferred to Dr. W. B. Johnson, who is now the owner and holder of same. Joseph S. Talton died and his son, Joe E. Talton, and wife, Mrs. Lena Talton, defendants, executed and delivered to the plaintiff bank a mortgage on the undivided interest of said Joe E. Talton in the lands of his father, Joseph S. Talton, deceased, to secure a note of $2,000 payable to said plaintiff. Default was made in the payment of the note made by Joseph S. Talton, deceased, secured by the deed of trust to the defendant Green, and thereupon the holder of said note made demand upon Green, trustee in said deed of trust, to advertise the property described therein. Advertisement was duly made under said deed of trust and the land offered for sale on 25 April, 1929, at which sale the defendants, Joe E. Talton and Mrs. Ethel T. Brannon, heirs at law of Joseph S. Talton, became the last and highest bidders for said lands at the sum of $6,600. A report of the sale was duly made by the trustee within a day or two after the sale. The defendant, Joe E. Talton, told the cashier of plaintiff bank that he was making arrangements to pay off the indebtedness of $2,000 held by said bank. Whereupon said cashier informed Joe E. Talton that if such arrangement were made the bank would not raise the bid on the land, but that said bank would raise the bid unless the matter was adjusted. Within a period of ten days the cashier of plaintiff bank communicated with the clerk of the Superior Court of Johnston County and informed the clerk that said bank desired to place an increased bid on the purchase price of said property if Talton did not make payment. The clerk of the Superior Court further informed the cashier of plaintiff bank that the tenth day after the sale would be 5 May, 1929, but that in view of the fact that such date was on Sunday, that Monday, 6 May, 1929, would be the final date for raising the bid. In the early afternoon of 6 May, 1929, the cashier of plaintiff bank called the clerk of the Superior Court at Smithfield and inquired "if said bid had been raised or if the said Joe E. Talton had deposited with the clerk an amount sufficient to cover the indebtedness of the Clayton Banking Company, . . . and the clerk of the Superior Court informed the said cashier that neither had been done; that thereupon the said cashier informed the clerk of the Superior Court that the Clayton Banking Company desired to raise the bid for said lands, and that he, the said cashier, would come over to Smithfield immediately and bring a cashier's check for $330, representing five per cent of the previous bid; that the clerk of the Superior Court thereupon informed said cashier that it was not necessary for him to come over to Smithfield, a distance of twelve miles, for that purpose, but that it would be sufficient if he, the said cashier, would on that date, 6 May, 1929, place a cashier's check for $330 in a stamped envelope and mail the same to the clerk of the Superior Court, and that if such was done that he would consider it as a deposit made as of that date, and that upon such deposit an order of resale would be entered for said lands; that upon such information, the cashier of the Clayton Banking Company, about 3:30 p.m., 6 May, 1929, mailed or placed a duly executed cashier's check in an envelope, in the postoffice at Clayton, N. C., stamped and addressed to H. V. Rose, clerk of the Superior Court of Johnston County, Smithfield, which envelope containing said check was mailed as aforesaid, at the postoffice in the town of Clayton, N. C.; that later in the same afternoon, 6 May, 1929, F. H. Brooks, attorney for said bank, at the request of said bank, went to the office of the clerk of the Superior Court and again informed said clerk on the part of the Clayton Banking Company, that the said Clayton Banking Company desired a raise of bid, and offered to give the said clerk his personal check for the amount of said raise; that the said clerk informed the said F. H. Brooks that he had already discussed the matter with the said cashier over the telephone and notified him that it would be sufficient if the cashier would mail him a check, and that the cashier had done so, and that he would consider that a raise of bid, and that an order of resale would be made, and that it was not necessary for the said F. H. Brooks to put up his personal check on behalf of the bank. On the morning of 7 May, 1929, the said cashier's check in the amount of $330 was duly delivered to the clerk of the court by letter, in an envelope bearing clearly the Clayton post mark, under date of 6 May, 1929; that said check was in due form and was collectible, and the clerk of the court accepted the same as a raise of bid on said land, pursuant to his understanding with the cashier of the Clayton Banking Company; that on the morning of 9 May, 1929, the deputy clerk of the Superior Court of

Johnston County, under instructions from the clerk, wrote on said sale book an order for resale as of 6 May, 1929, but said order of resale was not actually signed by the clerk of the court until 16 May, 1929; that theretofore Joe E. Talton, one of the bidders at the original sale, informed the trustee that he had assigned his bid to his wife, Lena Talton, and the said Lena Talton, as assignee, with Ethel T. Brannon, the other bidder at said sale, made demand upon the trustee for a deed. . . . That the trustee, being of the opinion that there was no valid increase of bid, undertook in pursuance of the demand of said bidders and assignee to deliver a deed as trustee to the said bidders, but before delivery of such deed, said trustee was . . . restrained from delivering said deed to the said purchasers."

Upon the foregoing facts the trial judge was of the opinion and so adjudged "that the deposit of said cashier's check, mailed at Clayton, N. C., on 6 May, 1929, in an amount representing five per cent of said bid, and under the circumstances as existed and as found by the court, constituted a valid and sufficient raise of bid for said lands, under the provisions of the statute, and that the clerk of the Superior Court was acting within his authority in so accepting such payment, and that an order of resale was and is a valid and proper order," etc.

From the foregoing judgment the defendants appealed.

E. J. Wellons, F. H. Brooks and Biggs & Broughton for plaintiff.
W. P. Aycock, W. H. Lyon and N. Y. Gulley for defendants.

BROGDEN, J. Was there a valid increase of bid under the circumstances set forth in the facts found by the trial judge?

The correct answer to the question of law presented involves a construction of C. S., 2591. This section has been construed in many decisions of this Court, notably *Wise v. Short,* 181 N. C., 320, 107 S. E., 134; *In re Sermon's Land,* 182 N. C., 122, 108 S. E., 497; *Pringle v. Loan Association,* 182 N. C., 316, 108 S. E., 914; *In re Ware,* 187 N. C., 693, 122 S. E., 660; *Trust Co. v. Powell,* 189 N. C., 372, 122 S. E., 660; *Briggs v. Developers,* 191 N. C., 784, 133 S. E., 3; *Newby v. Gallop,* 193 N. C., 244, 136 S. E., 610; *Cherry v. Gilliam,* 195 N. C., 233, 141 S. E., 594.

However, it does not appear that the exact point raised in the case at bar has been determined. It is clear from the decided cases that the statute confers no power on the clerk to make orders in the cause with respect to a resale unless the bid is increased. It is also clear that an order of sale or of resale made *nunc pro tunc* is valid. *Lawrence v. Beck,* 185 N. C., 196, 116 S. E., 424.

The statute requires that the money representing an increased bid is to be "paid to the clerk of the Superior Court." Does this language mean that the money must be actually placed in the hands of the clerk by the person desiring to raise the bid, or is it sufficient to pay the money within a period of ten days to a duly authorized agent of the clerk?

It is familiar learning that the delivery of a deed is ordinarily necessary to pass title to land. In *Lynch v. Johnson,* 171 N. C., 611, 89 S. E., 61, this Court held that, if a deed properly executed, was placed in an envelope, properly stamped and addressed and deposited in the mail, that thereupon title to the property described in the deed vested in the purchaser named in the instrument. The theory upon which this principle rests is that the grantor had parted with possession and control of the paper-writing by placing it in due course of delivery to the grantee. In *Pringle v. Loan Association, supra,* it was stated by the Court that "in all such cases if the prescribed amount of the raise in bid is guaranteed, or paid, to the clerk he shall require the mortgagee or trustee to advertise and resell on 15 days notice." A strict construction of this language would indicate that if the increased bid is guaranteed, the requirements of the statute would be met. However, it is not necessary to place this decision upon that ground. In *Briggs v. Developers, supra,* an increased bid of two per cent was deposited with the clerk. This deposit, of course, was not in strict compliance with the statute, but the increased bid was held to be valid. This case is direct authority for the position that substantial compliance with the statute with respect to the payment of the increased bid is fully recognized. The reason is that as the statute was enacted for the protection of mortgagors it must be construed liberally when reasonably necessary to effectuate that purpose.

The facts disclose that the clerk of the Superior Court of his own motion selected the United States mail as the agency for transmitting the money to the court. If the clerk of the Superior Court had sent his deputy from Smithfield to Clayton to receive the money and the deputy had actually received the money, but did not report to the clerk until next morning, it could not be successfully contended that the money had not been paid. Furthermore, it appears that the attorney for the plaintiff went in person to the clerk's office on the afternoon of 6 May, and offered to pay the money, but was informed by the clerk that the bid had already been raised and that an order of resale would be made in due course. Under these circumstances we are of the opinion and so hold, that the increased bid of plaintiff was duly filed and that the order of resale was valid.

The defendants rely upon *Wooley v. Bruton,* 184 N. C., 438, 114 S. E., 628. An examination of that case, however, discloses that the opinion was based upon the particular wording of the statute to the effect that the license must be "delivered to him as required by law," etc. The word "delivered" was construed to mean manual delivery. We cannot hold that the *Bruton case* is determinative of the legal principle involved in the case at bar.

Affirmed.

SIMPSON HARPER AND H. D. WILLIAMS v. VIRGINIA LUMBER AND BOX COMPANY.

(Filed 9 October, 1929.)

Contracts B e—In order to recover upon a contract for the division of profits, profits or bad faith must be shown.

In an action to recover upon a contract for the division of profits from the sale of timber by the defendant, the defendant to sell "to the best of his ability," the burden is on the plaintiff to show that a profit had been made or that the defendant had acted in bad faith in the sale in order to recover, and evidence as to profits made by other like manufacturers is immaterial.

APPEALS by both plaintiffs and defendant from *Grady, J.*, at March Term, 1929, of DUPLIN. No error in either appeal.

This is an action to recover the purchase price of certain timber conveyed to defendant by plaintiffs, by their deed dated 6 September, 1924. It was agreed that the said purchase price should be paid after said timber had been cut and manufactured into lumber by defendant, and after said lumber had been sold.

The said timber had been cut, and the lumber manufactured therefrom had been sold, prior to the commencement of this action. The action arose out of a controversy between the parties as to the terms of the contract in accordance with which the purchase price should be ascertained and paid. During the progress of the trial, plaintiffs consented that the jury might find that said terms were as alleged in the answer, and not as alleged in the complaint.

The issues submitted to the jury were answered as follows:

"1. Was the contract entered into between the plaintiffs and the defendant as follows:

Defendant was to advance to plaintiffs a basic price of three dollars per thousand feet, and then cut, remove and manufacture the timber on the Philips and Malpass tracts, and sell the same to the best of its ability, and in the event there was a profit from said operation over and above the expenses incident to the cutting, manufacture and marketing of said timber, and the basic price of three dollars per thousand feet, such net profits should be divided equally between the parties?

Answer: Yes, by consent.

2. If so, was there a breach of said contract on the part of the defendant, as alleged in the complaint? Answer: Yes.

3. If so, what amount are the plaintiffs entitled to recover of the defendant for lumber not paid for, or profits received and not accounted for under said contract, if anything? Answer: $800."

From judgment on the verdict, both plaintiffs and defendant appealed to the Supreme Court.

Geo. R. Ward, R. D. Johnson and Stevens & Beasley for plaintiffs.
Langston, Allen & Taylor for defendant.

PER CURIAM. Under the contract between the parties, as found by the jury, plaintiffs are entitled to recover for the timber sold and conveyed by them to defendant, three dollars per thousand feet; and also, one-half the profit, if any, resulting from the manufacture of said timber, and its sale by defendant. It was agreed that defendant should sell said lumber to the "best of its ability." It is not contended by plaintiff that defendant failed to exercise good judgment in the sale of the lumber, or that it failed to get the best market price for the same.

There was conflict in the evidence tending to show the number of feet of timber cut and manufactured by defendant; it was admitted that defendant has paid to plaintiff on account of said timber the sum of four thousand dollars; under the instructions of the court, the jury has found that plaintiffs are entitled to recover the additional sum of $800 for stumpage.

There was no evidence tending to show that defendant made any profit by cutting and manufacturing the timber, or by the sale of the lumber. The evidence tended to show a loss on the operation because of the price at which the lumber was sold. The burden was on plaintiff to show that the lumber was sold at a profit. There was no error in the instruction that plaintiffs were not entitled to recover any sum as their share under the contract in profits. It is immaterial that other sawmill operators made a profit on lumber manufactured and sold by them during the years 1924 and 1925. In this action, in the absence of evidence tending to show bad faith on the part of defendant, it is liable only for profits made, and not for profits which it might have made.

Defendant cannot complain that after the evidence had been introduced, plaintiffs consented that the jury find that the contract between them and defendant was as alleged in the answer, and not as alleged in the complaint. The evidence tending to sustain plaintiff's contention that under this contract it was entitled to recover in this action, was properly submitted to the jury.

We find no error in either appeal. The judgment is affirmed.

No error.

C. M. KROUSE v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 9 October, 1929.)

Negligence D c—Where evidence shows contributory negligence barring recovery nonsuit is proper.

Where the evidence offered by the plaintiff shows contributory negligence barring his right to recover a nonsuit is proper.

APPEAL by plaintiff from *Daniels, J.*, at March Term, 1929, of PITT. Affirmed.

Action to recover damages for personal injuries resulting from a collision, on a public crossing, between an automobile driven by plaintiff and defendant's train.

From judgment dismissing the action as upon nonsuit, plaintiff appealed to the Supreme Court.

W. C. Gorham and Julius Brown for plaintiff.
F. G. James & Son for defendant.

PER CURIAM. Conceding that the evidence offered by the plaintiff tended to show that defendant was negligent as alleged in the complaint, this evidence also showed that plaintiff contributed to his injuries by his own negligence. There is no error in the judgment dismissing the action as upon nonsuit. *Bailey v. R. R.*, 196 N. C., 515, 146 S. E., 135.

Affirmed.

C. D. HEATH v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 October, 1929.)

1. **Railroads D g—In action to recover for negligent fire the burden is on plaintiff to show railroad caused fire and on it to show due care.**

In order for the plaintiff to recover damages from a railroad company for setting fire to his barn off the right of way by sparks from the defendant's locomotive, the burden is on the plaintiff to show that the fire was caused by sparks from the locomotive, and then on the railroad company to show that its engine was properly equipped and operated, and upon supporting evidence the issue of negligence is for the jury, and the defendant's motion as of nonsuit is properly denied.

2. **Same—The setting afire of a barn by sparks from locomotive is some evidence of negligence of railroad.**

Where there is evidence that plaintiff's barn off the right of way of the defendant railroad company was set afire by sparks from the defendant's locomotive shifting nearby, it is some evidence that the locomotive emitting the sparks was in a defective condition or that it was improperly operated.

3. **Same—Evidence in this case held sufficient on issue of railroad's negligence in setting fire to property.**

   Evidence that the defendant railroad company's locomotive was shifting cars near the property of the plaintiff, throwing off heavy smoke with live sparks that were carried by the wind to the plaintiff's barn, off the right of way, and that soon thereafter the barn caught fire and was destroyed, and that there was at the time no fire on the plaintiff's premises which could have started the conflagration, is sufficient to be submitted to the jury upon the defendant's actionable negligence.

4. **Same—Evidence that same locomotive emitted sparks night before fire is competent as to its defective condition.**

   Where there is evidence tending to show that defendant's locomotive was throwing off heavy smoke with live sparks which caused the fire in suit, testimony that the same locomotive on the night previous was emitting smoke and live sparks is competent upon the question of the defective condition of the locomotive on the issue of defendant's negligence in this respect.

CIVIL ACTION, before *Daniels, J.*, at May Term, 1929, of CRAVEN.

Plaintiff owned a tract of land upon which was situated his dwelling, a tobacco barn and packhouse within which there were stored hay, fodder, corn and fertilizer. The packhouse is about 104 feet from the railroad track and not upon the right of way. The evidence tended to show that on 6 March, 1928, a freight train owned and operated by the defendant was traveling east and stopped for the purpose of taking water and shifting cars near plaintiff's property. The train arrived about four o'clock in the afternoon and remained from fifteen to thirty minutes. While the train was shifting the engine emitted large quantities of smoke, which was driven by a northeast wind over and across the packhouse of plaintiff.

There was further testimony from a witness for plaintiff who stated that he was driving along the county road while the train was shifting near plaintiff's property, and that the train seemed to be overloaded and that "every now and then the engine spit." Witness further stated: "The engine was throwing out hot cinders because I put my coat over my neck to keep the cinders from burning me, because it did burn my mule."

Plaintiff also offered the testimony of a witness who stated that on the day before, to wit, on 5 March, he saw the same engine of defendant, which was alleged to have set fire to plaintiff's property, emitting live sparks, and that some of these sparks fell on him and burned him on the neck. There was testimony that there had been no fire in plaintiff's home near the packhouse or any fire around the packhouse before the fire was discovered. The train left shortly after four o'clock. There was testimony that between five and six o'clock fire was discovered on the packhouse next to the railroad track. The packhouse and its contents were destroyed according to the evidence of plaintiff, and he instituted this action for damages.

The defendant denied that its engine had emitted live sparks while shifting near plaintiff's property and offered strong proof to the effect that the engine was properly equipped with a spark arrester of the type approved and in general use, and that the engineer was thoroughly experienced and competent, and that the train was operated in a careful manner.

The jury answered the issue in favor of plaintiff and awarded damages in the sum of $1,200.

From judgment upon the verdict the defendant appealed.

D. L. Ward and D. L. Ward, Jr., for plaintiff.
Moore & Dunn for defendant.

BROGDEN, J. In cases of damage by fire, occasioned by the engine of a railroad company, there are ordinarily two questions to be determined in order to impose liability upon the defendant.

1. Did the engine set out the fire that burned the property?
2. If so, did the fire originate through the negligence of the defendant?

The principle of law governing liability for fire catching off the right of way was thus stated in *Moore v. R. R.*, 173 N. C., 311: "It is settled that if the plaintiff has introduced evidence sufficient in probative force to justify a jury in finding that the fire was caused by a spark from defendant's engine, the issue should have been submitted, the weight of the evidence being a matter for the jury. In such case the defendant is called upon to prove that its engine was properly equipped and operated. If so equipped and operated, there is no negligence or liability upon the part of defendant."

In the case at bar the trial judge, at the request of defendant, charged the jury as follows: "I charge you that under the law of North Carolina, if fire escapes from an engine in proper condition and having a proper spark arrester and operated in a careful way by a careful and competent engineer and the fire catches off the right of way, the defendant is not liable, for there is no negligence, and you should answer the first issue 'No.' "

The pertinent question standing at the threshold is whether there was sufficient evidence to be submitted to the jury upon the origin of the fire; that is to say, whether sparks from the defendant's engine set fire to plaintiff's property. There was evidence that hot cinders were emitted from defendant's engine at the time it was shifting near plaintiff's property, burning a mule of a witness standing near the railroad, and that the witness was compelled to put his coat over his neck for protection. There was evidence that the wind was blowing toward the plaintiff's property and that large volumes of smoke were coming from the smokestack of the engine. There was further testimony that on the day before, the same engine was throwing sparks which burned the shirt and neck of a witness. There was also evidence that there was no fire about plaintiff's dwelling or packhouse during the afternoon prior to the time the packhouse was burned.

We are of the opinion that there was sufficient evidence to be submitted to the jury on the question of the origin of the fire. Therefore, the motion for nonsuit was properly overruled.

Upon the question of negligence, it has been held that if fire was caused by sparks from the engine, that of itself was some evidence of negligence either in the condition of the spark arrester or in the operation of the engine. *Reid v. R. R.,* 180 N. C., 511, 105 S. E., 169.

The defendant earnestly insists that the evidence of the witness Cruel to the effect that the engine was throwing sparks the night before the plaintiff's property was burned, was incompetent. The position of the defendant upon this point would be sound and effective if the record did not disclose that the same engine was involved. A witness for defendant testified: "The engine they claimed the barn was burned by was coming back toward New Bern; that was the same engine that went to Goldsboro the night before." Another witness for defendant testified: "Engine No. 134 that came down from this direction on the evening of the 5th of March went to Goldsboro, and the same engine came back on the afternoon of the 6th."

The prevailing rule of law with reference to this aspect of the case is thus declared in *Kerner v. R. R.,* 170 N. C., 94, 86 S. E., 998: "It is conceded that where a fatal fire has been set out from a designated or known engine, it is admissible to introduce evidence of other fires previously set out by the same engine for the purpose of showing its defective condition, but the rule has never been extended so as to permit evidence of sparks emitted by some other engine at some other time and place."

No error.

IN RE LAST WILL AND TESTAMENT OF THOMAS FRANCISCO BROCKWELL.

(Filed 16 October, 1929.)

1. **Wills D i—Instruction in this caveat proceeding held not to be expression of opinion by court as to validity of the will.**

   Where the judge in his charge upon a caveat to a will uses the word "will" in referring to the paper-writing being propounded, it will not be held as an expression of the court upon the weight and credibility of the evidence contrary to the requirements of the statute when it appears from the context of the instruction that he was only referring to the writing itself, and must have been so understood by the jury.

2. **Wills D h—Caveators must show fraudulent substitution of sheets when relied on by them.**

   Upon the trial of a caveat to a will where it is contended that one of the several sheets of the writing had been substituted for the original, the caveators must show a fraudulent substitution, and they cannot prevail in this contention when there is no evidence thereof; and where it appears on appeal that the jury has accepted the evidence to the contrary under correct instructions, the judgment of the lower court sustaining the paper-writing as the will will be sustained.

3. **Appeal and Error J e—In this case held: error, if any, in the admission of certain testimony was harmless.**

   Testimony of a witness over appellant's exception in explanation of matter elicited from him on cross-examination, with but little, if any, bearing upon the issue submitted, is not held for reversible error under the facts of this case.

APPEAL by caveators from *Harris, J.*, at second June Term, 1929, of WAKE. No error.

This is a proceeding for the probate in solemn form of a paper-writing propounded as the last will and testament of Thomas Francisco Brockwell, deceased. The paper-writing had been probated in common form by the clerk of the Superior Court of Wake County. Upon the filing of a caveat to said probate, the proceeding was transferred to the civil issue docket of the Superior Court of said county, as provided by statute.

The issue submitted to the jury was answered as follows: "Is the paper-writing offered in evidence and every part thereof the last will and testament of Thomas Francisco Brockwell? Answer: Yes.

From judgment on the verdict, caveators appealed to the Supreme Court.

W. B. Jones for propounders.

W. F. Evans, C. A. Douglass, R. L. McMillan and T. Lacy Williams for caveators.

CONNOR, J. An examination of the record in this appeal fails to disclose any error for which a new trial of the issue involved in this proceeding should be granted. We do not, however, approve the form of the issue submitted to the jury at the trial.

A paper-writing propounded as the last will and testament of a deceased person is not necessarily offered in evidence. In this case, however, the paper-writing was offered in evidence upon the contention that some of the sheets of paper constituting the will as propounded, were not attached to the last sheet, when the testator and the witnesses wrote their names on said sheet. Ordinarily the paper-writing should be described in the issue as "the paper-writing propounded as the last will and testament of the deceased."

There was evidence tending to show the execution by the deceased of the paper-writing propounded for probate as his last will and testament, in accordance with the requirements of the statute. C. S., 4131; this evidence was submitted to the jury under instructions of the court which are free from error. The reference by the court in the charge to the jury to the paper-writing as "the will," could not have been understood by the jury as an expression by the court of its opinion that the paper-writing was the will of deceased. The context shows that the court in the use of the word "will" was referring to the paper-writing.

The jury has found that the paper-writing consisting of sheets of paper attached to each other by clips or fasteners, such as are in ordinary use, and every part thereof, was executed by the deceased as his last will and testament. There was ample evidence to sustain this finding. Indeed, it may be doubted whether there was any evidence to the contrary. There was certainly no evidence to support a suggestion that there had been a fraudulent substitution of sheets of paper, before or after the deceased and the witnesses signed the last sheet. The testimony of the draftsman of the will—a lawyer of experience and of high character—was accepted by the jury as conclusive upon this phase of the case.

Conceding that there was evidence in support of the contentions of the caveators, sufficient to rebut the presumption to the contrary, (1) that the deceased, at the time he signed said paper-writing did not have sufficient mental capacity to make a will, or (2) that he signed said paper-writing because of undue influence, and that for either reason the said paper-writing is not his last will and testament, we find no error in the submission of these contentions to the jury at the trial. Under instructions which we find free from error, the jury has found that the deceased, at the time he signed the paper-writing did have sufficient mental capacity to make a will, and that he did not sign the same because of undue influence.

There was no prejudicial error in the refusal of the court to sustain objections of the caveators to the testimony of one of the propounders, a son of the deceased and a devisee under the will, with respect to the relations between him and the deceased, his father. This testimony had little, if any, probative value as evidence upon the issue submitted to the jury; it was offered solely in explanation of matters elicited from the witness by the caveators on cross-examination. If it was error to overrule the objections of caveators, the error was harmless.

We do not deem it necessary to discuss *seriatim* the assignments of error on this appeal. They present no questions which have not been repeatedly decided by this Court. The principles of law ordinarily applicable in a proceeding of this nature are so well settled by decisions of this Court, that these decisions need not be cited.

The judgment in the proceeding is affirmed. There is

No error.

STATE v. REDMOND WILSON.

(Filed 16 October, 1929.)

Criminal Law B a—Defendant must prove defense of mental incapacity to commit crime to the satisfaction of the jury.

Where the defense in the prosecution for a capital felony is mental disability resulting from hereditary weakness and augmented by a syphilitic infection, the burden is on the defendant to establish his defense to the satisfaction of the jury.

APPEAL by defendant from *Grady, J.*, at May Term, 1929, of PENDER.

Criminal prosecution tried upon an indictment charging the defendant with a capital felony.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

George R. Ward, R. D. Johnson, Best & Moore and McCullen & McCullen for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on 27 April, 1929, the prisoner, Redmond Wilson, a colored man, shot and killed Vess Wilson, his first cousin, under circumstances indicative of a mind fatally bent on mischief and a heart devoid of social duties. The deceased was sitting in a chair, packing strawberries, under a pack shelter, in the edge of a field, when the prisoner, in broad open daylight, came within twenty-five yards, approaching from the rear, deliberately placed his gun to his shoulder, took aim, and without warning shot the deceased in the back inflicting a mortal wound. It is suggested that the prisoner held a grudge against the deceased because the latter had upbraided him about three weeks before for approaches to his granddaughter. It was further in evidence that on the same morning, about three hours prior thereto, the prisoner had shot and wounded John Henry Wilson, a son of the deceased.

The homicide is not denied. The defense interposed on behalf of the prisoner was that of mental debility, resulting from hereditary weakness augmented by a syphilitic infection, which, it is alleged, amounted in the aggregate to irresponsibility or insanity. The evidence tending to support this plea was properly submitted to the jury, but was found to be unsatisfactory. *S. v. Terry,* 173 N. C., 761, 92 S. E., 154.

It is now well settled, by a long line of decisions, that, in this jurisdiction, as well as in many others, in a criminal prosecution, when insanity is interposed as a defense, the burden is on the defendant, who sets it up, to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Jones,* 191 N. C., 753, 133 S. E., 81, and cases there cited.

After perusing the record with that degree of care which the case merits, we have found no error committed on the trial. The verdict and judgment will be upheld.

No error.

STATE v. MACON O'NEAL.

(Filed 16 October, 1929.)

1. **Intoxicating Liquor B a—Constructive possession of intoxicating liquor is sufficient evidence of violation of Prohibition Statute.**

   Constructive possession of intoxicating liquor is sufficient to take the case to the jury under an indictment for violating our prohibition law by receiving, possessing, transporting, selling intoxicating liquor, and having it on hand for the purpose of sale.

2. **Criminal Law I b—When prisoner is absent when verdict is rendered, and has not waived his right to be present, a new trial will be ordered.**

   The returning into court by the jury of a verdict of guilty of violating our prohibition law, while the defendant is in prison, violates the defendant's constitutional rights (Declaration of Rights, sec. 11), and in the absence of a proper waiver of this right a new trial will be ordered on appeal.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1929, of WAKE. New trial.

Macon O'Neal, Herbert O'Neal, and Vernon O'Neal were charged in one indictment with a violation of the prohibition law by receiving, possessing, transporting, selling, and having on hand intoxicating liquor for the purpose of sale. There was a general verdict of guilty as to all the defendants. From the judgment pronounced Macon O'Neal appealed upon assigned error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Charles U. Harris for defendant.

ADAMS, J. There is at least some evidence that intoxicating liquor was found on premises used by the defendants; and for this reason, by virtue of the statutory direction that the prohibition act "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," the trial court committed no error in submitting to the jury the question of the defendant's constructive possession of the prohibited article. *S. v. Meyers,* 190 N. C., 239; *S. v. Pierce,* 192 N. C., 766; *S. v. Weston, ante,* 25.

But on another ground the defendant is entitled to a new trial. When the verdict was returned he was not in the courtroom, but was in prison, confined in close custody. Nor was his attorney present. "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty." Declaration of Rights, sec. 11.

In the application of this fundamental principle it has been held that in a capital felony the prisoner cannot waive his right to be present at any stage of the trial. Not only has he a right to be present; he must be present. *S. v. Kelly,* 97 N. C., 404; *S. v. Dry,* 152 N. C., 813. In felonies less than capital the right to be present can be waived only by the defendant himself *(S. v. Jenkins,* 84 N. C., 813), but in misdemeanors the right may be waived by the defendant through his counsel with the consent of the court. *S. v. Dry, supra; S. v. Cherry,* 154 N. C., 624.

Imprisoned, the defendant could not be present when he was convicted by the jury; and there is no suggestion that he waived his right by express consent, or failure to assert it in apt time, or by conduct inconsistent with his right. He is not entitled to his discharge, but merely to a new trial. *S. v. Jenkins, supra.*

New trial.

MRS. C. R. TOWNSEND v. J. C. HOLDERBY ET AL.

(Filed 16 October, 1929.)

1. **Husband and Wife F a—Wife may bring action for alienation of affections of husband without his joinder.**

   An action brought by the wife against her husband's step-father and brother for alienating his affection from her and causing his continuous separation is in tort and does not require the joinder of her husband therein, and is not a defect of parties.

2. **Husband and Wife E b—Burden of proof of alienation of affections of husband is on wife in her action therefor.**

   In an action by a wife against the step-father and brother of her husband for alienating her husband's affections, and causing him to continue to live apart from her, the burden is upon her to prove these matters when alleged by her and denied by the defendants.

3. **Same—Evidence that defendants alienated the affections of plaintiff's husband held insufficient in this case.**

   Where in an action by a wife against the step-father and brother of her husband for the alienation of her husband's affections, the evidence introduced by the wife fails to show any malice or ill-will of the defendants toward her or that the defendants did anything to alienate the affections of the husband or cause him to separate himself from her and continue to live apart from her, but tends to show that his separation was caused by a groundless delusion due to his mental condition, with further evidence that the husband lived with the defendants after the separation, is insufficient to be submitted to the jury, and a nonsuit should be granted, the law not imputing any purpose to injure the plaintiff from the fact that the defendants allowed the husband to live with them after the separation.

APPEAL by defendants from *Lyon, Emergency Judge,* at April-May Special Term, 1929, of PITT. Reversed.

Action to recover damages caused by the wrongful and malicious alienation of the affections of plaintiff's husband, resulting in his abandonment of her.

It is admitted that plaintiff and her husband are now living separate and apart from each other, and that they have so lived since 1924; defendants deny, however, that they or either of them caused such separation, or that they have prevented the return of plaintiff's husband to her.

It is admitted that when plaintiff's husband left his home in July, 1924, he had a delusion, which was wholly without justification in fact, with respect to plaintiff's fidelity to him, and that said delusion was due to the unfortunate mental condition of said husband. The evidence tended to show that said delusion has persisted, notwithstanding the assurances of friends and relatives that it was groundless.

Plaintiff and her husband were married in 1915. They lived together happily until the summer of 1924. During this time three children were born. Plaintiff's husband was successful in business, and all the evidence was to the effect that he maintained a comfortable home for his wife and children, being at all times an affectionate husband and a devoted father. In the summer of 1924 he suffered a breakdown in his health, both physical and mental. Upon the advice of plaintiff and her relatives, he left his home in this State on 2 July, 1924, and went to Richmond, Va., where he entered a sanatorium for treatment. There was no evidence tending to show that defendants or either of them advised with or counselled plaintiff's husband with respect to his health or with respect to his leaving his home. Plaintiff testified that she urged her husband, after consultation with her father, to go to the sanatorium for treatment. She also testified that "the first estrangement that arose between me and my husband was for some reason other than conduct on the part of the Holderbys. I think the cause of the first estrangement between myself and my husband was due to financial reasons, or business transactions, in which neither of the Holderbys had anything whatever to do, that I know of. He never alluded to my being untrue to him until just before he went to the hospital. He accused me of infidelity after the birth of my baby." She further testified, "I think all of the unfortunate occurrences related by me were due to the mental condition of my husband."

While plaintiff's husband was in the sanatorium at Richmond, he communicated with defendants, J. C. Holderby, his step-father, and Murrill Holderby, his brother. At his request, one or both of them went to Richmond to see him. He returned to this State with them, and entered a hospital at Wilson, where the defendants then resided. He remained in this hospital for several weeks; while he was there defendants visited him frequently. When he left the hospital, he went to the home of defendants, Murrill Holderby and his wife, Lillie Holderby. He remained in their home for some time and then went to a hospital at Battle Creek, Michigan. Since leaving that hospital, he has traveled widely throughout the United States, sometimes on business and sometimes visiting relatives. He now lives at Valdosta, Georgia, where he makes his home with defendants, Murrill Holderby and Lillie Holderby. The defendant, J. C. Holderby, now lives at Mullins, S. C. Plaintiff's husband has not lived with her since July, 1924. Plaintiff testified, "I think the beginning of the estrangement between my husband and myself was due to his mental condition. I think the defendants are the cause of his staying away. I do not think they caused his mental condition, but they are the cause of his not keeping well." There was no evidence tending to show any conduct on the part of the defendants, or of either of them, which supports plaintiff's opinion that defendants have prevented the return of her husband to her, unless it be evidence to the effect that they have associated with him and permitted him to live in their home.

After plaintiff's husband left her in the summer of 1924 and after she had been informed that he justified his conduct toward her by charging that she had been unfaithful to him, she caused a warrant to be issued for his arrest on the charge that he had slandered her. He has not been arrested on this warrant. Upon learning of the issuance of the warrant, he left the State and has since remained out of the State for the purpose of avoiding arrest. Plaintiff thereafter instituted a proceeding under the laws of this State, for an allowance to be made out of her husband's estate for her support. In this proceeding an order was made for such allowance and said order has been complied with. Plaintiff has received from her husband's estate money and property for the support of herself and children, in accordance with said order.

The issues submitted to the jury were answered in favor of the plaintiff and against the defendants.

From judgment on the verdict, that plaintiff recover of the defendants both compensatory and punitive damages as assessed by the jury, defendants appealed to the Supreme Court.

Walter G. Sheppard and J. Paul Frizzell for plaintiff.
L. W. Gaylord and Harding & Lee for defendants.

CONNOR, J. Whatever may be the law in other jurisdictions, it is settled in this State by authoritative decisions of this Court, that a married woman, who has been abandoned by her husband, can maintain an action in her own name for a tort. *Brown v. Brown,* 121 N. C., 8, 27 S. E., 998. In that case it was held that a complaint in which the plaintiff alleged that the defendant had alienated the affections of her husband, and induced him to abandon her and to refuse to contribute anything to her support, was not demurrable on the ground that it appeared on the face of the complaint that there was a defect of parties for that plaintiff's husband had not been joined with her as a party plaintiff. Upon an appeal from the judgment on the verdict in that case, 124 N. C., 19, 32 S. E., 320, it was held that "before a parent can be held liable in damages for advising his married child to abandon his wife or her husband, the conduct of the parent should be alleged and proved to be malicious; that the wilful advice and action of the parent in such a case may not be necessarily malicious, for the parent may be determined and persistent and obstinate in his purpose to cause the separation and yet be entirely free from malice—in fact, have in view the highest good of his child." This principle is applicable not only when the defendant in an action for alienation of affection is the parent of the plaintiff's husband or wife, as the case may be, but also where the defendant is a near relative of plaintiff's husband or wife. *Powell v. Benthall,* 136 N. C., 145, 48 S. E., 598. In that case, it was held that the principle is applicable where defendants are the brother-in-law, and sister of plaintiff's wife. See 30 C. J., p. 1131, and cases cited in support of the text, which is as follows:

"The rule permitting parents to advise their children in good faith applies when the special circumstances require it, in favor of other near relatives of plaintiff's spouse, and in favor of such spouse's guardian, but a defendant cannot claim any such protection where the evidence fails to disclose the necessary special circumstances."

In the instant case, defendants do not admit that they have caused plaintiff's husband to separate himself from her, nor do they admit that they have caused him to live separate and apart from her, and upon such admissions rely upon the contention that their conduct was not wrongful and malicious. They deny the allegations in the complaint that they caused the separation, or that they have caused its continuance. The burden was therefore on the plaintiff to prove the truth of her allegation with respect to these matters. *Gross v. Gross,* 70 W. Va., 317, 73 S. E., 961, 39 L. R. A. (N. S.), 261.

A careful examination of all the evidence set out in the case on appeal fails to disclose any evidence tending to show conduct on the part of defendants, or of either of them, which was designed to, or which in fact did cause plaintiff's husband to separate himself from her, or to continue to live separate and apart from her. The fact that he has lived with defendants, making his home from time to time with them, taken in connection with his admitted relationship to them, is not sufficient to show that defendants have alienated his affection from the plaintiff, or that they have caused him to continue to live separate and apart from her. The conduct of defendants with respect to plaintiff's husband is altogether consistent with a purpose on their part to aid him; the law will not impute a purpose to injure plaintiff, as she alleges. There was no evidence tending to show that either of the defendants have done any wrong to the plaintiff, or that either of them have any ill will or malice toward her. Plaintiff's unfortunate situation was not caused by the defendants. All the evidence tends to show that it is caused by the groundless delusion of her husband, due to his unfortunate mental condition.

There was error in the refusal of the court to allow defendants' motion for judgment as of nonsuit, at the close of the evidence. The action should be dismissed. To that end the judgment is

Reversed.

STATE v. JIM BARBER.

(Filed 16 October, 1929.)

Homicide H c—Instruction in this case held prejudicial error.

Upon the trial for a homicide, where the evidence tends to show that another struck the blow resulting in death, and that the defendant struck a blow which was not mortal, and the inference is not permissible from the evidence that they acted in concert, or that the two blows were struck at the same time, an instruction that is capable of the interpretation that if the other person struck the mortal blow the defendant would be guilty, is error prejudicial to the defendant entitling him to a new trial on appeal.

APPEAL by defendant from *Daniels, J.,* at August Term, 1929, of LENOIR. New trial.

James Barber and Rochelle Turnage were indicted for the murder of Simon Gray, the State not requesting a verdict for murder in the first degree. At the conclusion of the evidence the action was dismissed as to Turnage, but prosecuted as to Barber, against whom there was a verdict for murder in the second degree.

Evidence for the State tended to establish the following circumstances: About 8 o'clock on the night of 3 August, 1929, the defendant in company with James Williams, Rochelle Turnage and Leslie Gray went to a tobacco barn where the deceased was curing tobacco. The deceased was lying on a bunk under the shelter. Turnage, who seemed to be drunk, shook him and the two began to fight each other. Each cursed the other, and the deceased got a bottle and hit Turnage in the forehead. Leslie Gray then ran away. While the deceased was bent over Turnage, who was on his knees, the defendant came up, stood behind the deceased, struck him on the head with a truck round about three feet long and about the size of a man's wrist or arm. The deceased fell trembling. The defendant refused to assist Bruce Croom in taking the deceased home, saying that he "could not handle him" and "could not mess with him." After saying he had "knocked hell' out of him, the defendant remarked: "Let the damn son of a bitch stay there and they won't know who did it."

There was evidence tending to show that Randolph Davis inflicted the mortal blow; that he had a grudge or ill feeling against the deceased, had made threats against him, and on Sunday afternoon preceding the killing at night, had got some shells and threatened his life. It was in evidence that after the homicide Davis admitted that he had struck the deceased; said he ought to have been killed, and asked Leslie Gray not to say who had hit the deceased.

The defendant testified: He served sixty days on the roads, four or five years ago; that he raised tobacco on the place where this barn stood; that he and Simon were together that morning curing tobacco; that he told Simon he would stay that night; that there was no feeling between them; that he came to the barn about 8 o'clock and told Simon that he would go get supper and come back; that the furnace could not be seen from where the witness Williams was sitting in the car; that the end of the shelter was boarded in; that when the car drove up to the tobacco barn that night Turnage got out and went to the barn; that he, Barber, put a piece of wood in the furnace; that Turnage shook Simon, and that Simon cursed him; that Simon stooped to pick up something; that Turnage pushed him away, and that they ran into each other again; that Randolph Davis came up and struck him with a truck round. The defendant said that Simon had not done anything to him, and that they were on good terms; that Randolph Davis hit Simon twice and that Turnage then jumped up; that he told them to help him take him up, and they would not do it; that Randolph said that he hit him; that Turnage and Simon cursed each other.

There was evidence that the defendant's character was good.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw & Jones for defendant.

ADAMS, J. After the homicide had been committed Dr. Lee examined the body of the deceased. He found two wounds on the head: a laceration from three and a half to five inches in length in a line from the right eye back toward the ear, the laceration extending to the bone, and a bruise over the left temple three or four inches long and two inches wide. The witness expressed the opinion that death was caused by a fracture of the skull and contusion of the brain resulting from a lick or blow, and that the laceration or incision could have caused the fracture at the base of the skull; that is, that the laceration could have produced death. There is other evidence which would sustain the conclusion that death resulted from the wound on the left temple.

It is evident that neither of these wounds was inflicted by Turnage. There is evidence that both the defendant and Randolph Davis struck the deceased. James Williams testified that the wound on the left temple was inflicted by the defendant with a truck round; the defendant said that he did not use the round, but that Randolph Davis used it. The evidence would have warranted the jury in finding that the defendant made the wound on the left temple; that Randolph Davis made the other, and that the latter, and not the former, was mortal. That the defendant and Davis acted in concert or that the two wounds were simultaneous is not a necessary deduction from the evidence. It is in these circumstances that the defendant excepted to the following instructions:

"Now, gentlemen, it is competent for the defendant to testify that somebody else actually did the killing or struck the blow from which the deceased died, in order to exonerate himself, if he can, and if the jury accepts his statement, "because if he never struck at all, somebody else did strike the blow which killed the deceased, then the defendant could not be guilty."

"Now, you are not trying Randolph Davis, you are trying the defendant, but as I say, if the evidence satisfies you that Randolph Davis is the man who struck the blow that killed the deceased, then you would have to find that the defendant was not guilty, if you believe the defendant himself did not strike."

The instructions, as they appear in the record, are susceptible of the construction that if Randolph Davis inflicted a mortal wound on the right side of the head and the defendant inflicted another wound which was not mortal, the defendant would be guilty merely because he struck the deceased, although there was no concert of action between them, and although there may have been an interval between the two blows. For this reason the defendant is entitled to a new trial.

New trial.

THE TOWN OF AYDEN v. E. A. LANCASTER AND DOVIE E. LANCASTER.

(Filed 16 October, 1929.)

1. **Trial F a—Issues submitted to jury in this case held sufficient.**

   Where the issues submitted to the jury on appeal from the clerk in condemnation proceedings are sufficient in form and substance to present all phases of the controversy to the jury, they will not be held for error on appeal to the Supreme Court.

2. **Eminent Domain C d—Measure of compensation for taking of lands.**

   Where lands of the owner are taken by a town for an enlargement of its existing cemetery, compensation therefor should be awarded for the market value of the land appropriated and for the depreciation in value of other contiguous lands of the owner naturally and proximately resulting from the particular use to which the land taken is to be put, less the special benefits accruing therefrom.

3. **Eminent Domain C c—Number of cemetery lots land taken would make it competent evidence of injury to adjacent lands.**

   Where a civil engineer has testified as to the area of the land petitioned by a city to be taken for an addition to its cemetery, it is but a matter of calculation as to how many cemetery lots of the usual size could be made therefrom, and testimony thereto is competent, taken with other evidence in the case, as to the damage to the value of other contiguous lands of the owner.

4. **Same—Use to which remaining land could have been put except for condemnation is competent evidence of damage thereto.**

The evidence of the depreciation in value of the owner's lands contiguous to that taken in condemnation proceedings by a town as an addition to its cemetery, it is competent for a civil engineer who has made a survey to testify from his own observations that the owner could have divided his land into lots along a certain extended street but for the condemnation.

5. **Eminent Domain C b—Evidence of value of other land similar to that taken is competent.**

Where the opinion of a witness upon the value of land condemned by a town is based upon his knowledge of the value of lands situated nearby, the competency of the testimony depends upon the evidence introduced tending to show the value in the one place was sufficiently similar to that in the other, and the question is for the jury.

6. **Witnesses D d — When witness makes inconsistent statements the credibility of his testimony is for the jury.**

Where a witness has testified in condemnation proceedings by a town for an addition to its cemetery with reference to the damage the owner has sustained by its taking, and on cross-examination makes inconsistent answers as to the correct basis of his opinion, his testimony is for the jury upon the credibility of the witness.

7. **Eminent Domain D d—Judgment in condemnation proceedings should definitely describe property and set forth rights of petitioner therein.**

The judgment in condemnation proceedings by a town against private lands should describe the land appropriated with certainty and set forth the rights of the petitioner to the land and easement, and that upon the payment of the amount assessed the title of the petitioner shall become absolute.

APPEAL by plaintiff from *Daniels, J.*, and a jury, at March Term, 1929, of PITT. Modified and affirmed.

The petition sets forth the following land of defendant, Dovie E. Lancaster, to be condemned: "That your petitioner, the Town of Ayden, desires to enlarge its present cemetery, so as to take in the following described parcel of land, which is a part of the tract of land described in paragraph 3 of the petition, said parcel of land to be condemned, and used for cemetery purposes as follows: (Describing the land by metes and bounds) containing 1 1/5 acres, more or less. That your petitioner, the Town of Ayden, further desires to condemn for street purposes the following tract or parcel of land, being a strip of land 27 feet wide and 66 feet in length running a straight line and connecting with Seminary

Avenue, making a continuation of the said Seminary Avenue from Railroad Street to the cemetery and running a course S. 83 E." (The evidence indicates that the street was 27 feet by 662½ feet, 41/100 of an acre.) This is a proceeding under C. S., 2792, brought before the clerk of the Superior Court of Pitt County to condemn 1 1/5 acres of land as an addition to a cemetery, and 41/100 of an acre for street purposes in the town of Ayden. Commissioners were duly appointed by an order entered by the clerk, who awarded the owner, Dovie E. Lancaster, $900 for the land condemned. Thereafter the respondent, defendants, filed exception to the report of the commissioners on the ground that the land condemned was worth more than $900. The exceptions filed by the respondent were overruled by the clerk and the report confirmed, whereupon the respondent excepted to the ruling of the clerk and appealed to the Superior Court in term for trial by jury. The cause was tried at March, 1929, Civil Term of Pitt Superior Court before his Honor, F. A. Daniels, and a jury.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. What compensation is the respondent, Dovie E. Lancaster, entitled to recover of the petitioner, the Town of Ayden, on account of the taking of the land described in the petition for cemetery purposes? Answer: $653.

2. What compensation is the respondent, Dovie E. Lancaster, entitled to recover of the petitioner, the Town of Ayden, for the injury and damages, if any, to her other land by reason of the taking of said land and establishing said cemetery thereon? Answer: $500.

3. What compensation is the respondent, Dovie E. Lancaster, entitled to recover of the petitioner, the Town of Ayden, on account of the taking of the land described in the petition for street purposes? Answer: $418.40.

4. What compensation is the respondent entitled to recover of the petitioner, the Town of Ayden, if any, for injury and damages, if any, to her remaining land by reason of the taking of the said land for said street, as set out in the petition? Answer: Nothing.

5. What enhancement of value peculiar to her land and not in common with the other landowners in the vicinity came to Mrs. Dovie E. Lancaster by reason of the taking and laying out of the street mentioned in the petition and exceptions? Answer: Nothing." The total amount, including interest from date, $1,571.40.

The court below rendered judgment on the verdict. Plaintiff, petitioner, made numerous exceptions and assignments of errors and appealed to the Supreme Court.

Harding & Lee and Pittman & Eure for plaintiff, petitioner.
Julius Brown for defendants, respondents.

CLARKSON, J. This Court, in *Town of Ayden v. Lancaster,* 195 N. C., 297, held that in condemnation proceedings instituted by a town before the clerk of the Superior Court, to take lands for public municipal purposes, upon exception duly filed by the owner to the damages assessed by the commissioners and an appeal being taken to the Superior Court and a jury trial demanded on the issues raised by the exception, the landowner had a right to a jury trial in the Superior Court on the question of damages.

The present appeal by plaintiff, petitioner, is for errors which it contends the court below committed when the questions of damages were tried by a jury in the Superior Court. We see no error in the issues submitted; they are "sufficient in form and substance to present all phases of the controversy between the parties." *Virginia-Carolina Joint Stock Land Bank v. The First and Citizens National Bank of Elizabeth City, ante,* 526. The issues were premised on the law of this jurisdiction in condemnation proceedings. *Goode v. Asheville,* 193 N. C., 134.

The civil engineer who made the survey for respondents testified, without objection, that the land taken for cemetery purposes was one and 14/100 acres. "The size of the lots of the old and new cemetery is twenty by twenty, that is twenty feet square," and upon objection testified that the land taken in the present action was between 90 and 100 lots 20 by 20 feet. This was merely a simple question of arithmetic, taking into consideration the number of square feet in an acre that a civil engineer could easily calculate, and some evidence to indicate, no doubt, the damage to respondent's other land in having constantly so many new graves dug contingent to it. *R. R. v. Armfield,* 167 N. C., 464. The evidence did not elicit the selling price of the lots.

In *United States v. Chandler-Dunbar W. P. Co.,* 229 U. S., 51, 57 L. Ed., 1063, it is said: "The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it is taken." *Power Co. v. Hayes,* 193 N. C., at p. 107. We think the evidence competent.

Lurton, J., in *United States v. Grizzard,* 219 U. S., 180, 55 L. Ed., 165, said: "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, the injury due to the use to which the part appropriated is to be devoted." *R. R. v. Manufacturing Co.,* 166 N. C., at p. 173; *Power Co. v. Hayes, supra,* p. 104. In condemnation proceedings the rule in regard to damages is fully set forth in *Goode v. Asheville, supra,* at p. 136, as follows: "The measure of damages in such cases 'is the difference in value before and after taking, less the special benefits, and that increased value to the land enjoyed in common with others affected by the improvement is not a special benefit.' *Lanier v. Greenville,* 174 N. C., 311; *Campbell v. Commissioners,* 173 N. C., 500; *Elks v. Commissioners,* 179 N. C., 241; *Bost v. Cabarrus,* 152 N. C., 531; *R. R. v. Platt Land,* 133 N. C., 266. The Legislature has power to provide by statute that the damages accruing to the landowner can be reduced not only by special benefits received by the landowner, but by all benefits accruing to him 'either special or in common with others." *Miller v. Asheville,* 112 N. C., 768; *Lanier v. Greenville,* 174 N. C., 311. In *Stamey v. Burnsville,* 189 N. C., 39, the rule was thus declared: 'It seems to be the general rule in this jurisdiction that the compensation which ought to be made, just compensation, under our general statute is such compensation after special benefits peculiar to the land are set off against damages.'" See C. S., 1721 and 1722.

The civil engineer, witness for defendant, respondent, who had experience in value-standards, testified that from his survey and personal observations, the lands immediately west of the new cemetery and south of it, are suitable lands for subdivision into building or residential property. This was not objected to. The witness was then asked "if the new part of the cemetery had not been taken from Mrs. Lancaster and the street marked Cemetery Road had been extended southwardly in the same direction, could there have been two tiers of lots laid off between that and Blount Street according to your survey and observation, as shown on the Forrest property? Petitioner objected; overruled and petitioner excepted. Certainly the road could be extended on through in a southern direction and lots could be laid off or not on the westerly side of Cemetery Road if it was extended, and on the eastern side also, and also on the eastern side of Blount Street."

From the location of this particular land, the whole piece being 34 acres, the evidence indicates that it is in and adjacent to the town "her land continues eastward beyond the corporate limits." "All land taken is in corporate limits."

The witness indicated the method of subdivision, but did not put any value on the land. He only described the way the subdivision could be made and stated the facts. We can see no objection to this testimony.

In 1 Elliott on Roads and Streets, 4th ed., sec. 295, it is said: "If the situation, quality and character of the property are such as to make it peculiarly adapted to a certain purpose and to give it an especial value for that purpose, then damages should be assessed with reference to its adaptability to that purpose. . . . (Sec. 296) So, too, in a proper case, may its special value or adaptability to be made into city lots. Its availability for the purpose for which it is taken is to be considered likewise. But the evidence and consideration should not be confined to its value for such purpose, nor to the purpose to which the owner has actually applied it. The use or damage must not, however, be too remote, uncertain and speculative. . . . (Sec. 297) Incidental injuries stop short of remote, conjectural or speculative injuries, for the law does not attempt to furnish an absolutely complete indemnity to the landowner; it only undertakes to secure to him compensation for such injuries as are the natural and proximate result of the appropriation of the property to the particular public use." *Rouse v. Kinston,* 188 N. C., at p. 12; *Milling Co. v. Highway Commission,* 190 N. C., 692.

The price for which the 12 2/5 acres of land was sold to the Baptist Seminary, in proximity and similarity, and the price which defendant, respondent, paid for the 34 acres of land a few years prior, were at least permissible in corroboration.

On both of these aspects, the court below instructed the jury: "This evidence has been admitted for your consideration in corroboration of the witness' testimony as to the value he fixed upon these lands in September, 1923, not as independent evidence of its value, but merely in corroboration of the witness' statement, if it does corroborate him."

In *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., at p. 652, it is said: "Ordinarily the value of the property damaged is to be determined as of the time and place of its damage or injury. Proof of its value within a reasonable time under the circumstances of the particular case, before and after the injury is competent. *Newsom v. Cothrane,* 185 N. C., p. 161; 8 R. C. L., 487-8-9."

The exception and assignment of error as to the testimony of the old man who had lived in the vicinity all his life and knew the land taken for cemetery and street purposes and its market value at the time it was taken and gave his reasons and the damage, this cannot be sustained because on cross-examination he answered both ways to the effect that he did and did not base the damage upon the price they were selling the cemetery lots for. This affected the credibility of the witness and the probative force given to such testimony was for the jury. *Shell v. Roseman,* 155 N. C., 94; *Shaw v. Handle Co.,* 188 N. C., 236.

There are other assignments of error we do not think material to be considered, in reference to them we quote from Wigmore on Evidence, Vol. 1, 2 ed., p. 1136, part sec. 718: "Hence, the question arises how far an acquaintance with value standards in one place will suffice when the value in question is of a thing in another place. The witness' competency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down."

We do not think the assignment of error to portions of the charge of the court below can be sustained, yet no proper assignment of error was made. *Rawls v. Lupton,* 193 N. C., 428. From a careful reading of the charge we think the learned and painstaking judge in the court below gave succinctly the contentions, evidence and law applicable. The value testimony as to the property was conflicting, the probative force was for the jury.

The judgment should describe the land taken with certainty and should set forth the rights of the plaintiff, petitioner, to the land and easement, and, upon payment of the damages assessed by the jury, title to become absolute. See C. S., 607-608; *Beal v. R. R.,* 136 N. C., 298.

There is no error in the trial. The judgment is

Modified and affirmed.

NEW YORK INDEMNITY COMPANY v. CORPORATION COMMISSION OF NORTH CAROLINA, LIQUIDATING AGENT OF BANK OF BELHAVEN.

(Filed 23 October, 1929.)

1. **Principal and Surety B c—Surety's subrogated right against insolvent bank not subject to off-set by personal debt of sheriff.**

   Where a bank has received from the sheriff of the county funds of the county for deposit, and thereafter the bank becomes insolvent, and a judgment has been obtained against the surety on the sheriff's bond for the sum deposited, which has been paid, the effect of the judgment is to subrogate the surety to the rights of the county to a pro rated share in the distribution of the assets of the bank, and the sheriff being insolvent, a personal debt of the sheriff to the bank cannot be used as an off-set to the right of the surety thereto. *Coburn v. Carstarphen,* 194 N. C., 368, cited and distinguished.

2. **Sheriffs D a—Sheriff is insurer of public funds collected by him.**

   The liability of a sheriff for moneys he has collected for the county is that of insurer, the moneys so collected being regarded as held by the sheriff in trust for the county, and his liability for such funds can be discharged only by payment to the county under the provisions of the statute.

APPEAL by defendant from *Nunn, J.,* at Chambers, Raleigh, N. C., 13 September, 1929, of WAKE. Affirmed.

Submission of controversy without action. C. S., 626.

The facts: T. C. Swindell was sheriff of Hyde County. He deposited in the Bank of Belhaven $1,522.12 in the name of T. C. Swindell, sheriff. The funds so deposited came into his hands as sheriff and as county funds which he must account for and which he was obliged to pay over to the county of Hyde. He also carried a personal account in the name of T. C. Swindell. He borrowed money personally from the Bank of Belhaven and also personally endorsed some notes. The Bank of Belhaven closed its doors on 16 March, 1927, and the Corporation Commission undertook its liquidation. At the time of its closing, there was on deposit in said bank the aforesaid $1,522.12 of county funds of the county of Hyde and deposited in the name of T. C. Swindell, sheriff. There was also a deposit of $9.99 in the name of T. C. Swindell. At that time T. C. Swindell was personally indebted to said bank in the amount of $800 represented by note signed by him and was personally indebted to said bank as an endorser on two other notes in the amount of $500 and $370.75, respectively. The plaintiff in this action was surety on the official bond of T. C. Swindell, sheriff. In a suit by the proper officials of the county against the plaintiff and T. C. Swindell, sheriff, judgment was entered discharging, for a consideration paid by plaintiff, the obligation of said sheriff and of the plaintiff, his surety, to the said county and specifically subrogating the plaintiff to the rights of the said county in and to the deposit in the Bank of Belhaven carried in the name of T. C. Swindell, sheriff. Upon demand by the plaintiff that depositors' dividends be paid to it as the holder of the rights of the county of Hyde in said deposit, the Corporation Commission, liquidating agent, refused to make any such payment, but claimed a set-off because of the personal indebtedness to the bank of T. C. Swindell. T. C. Swindell is insolvent. Upon suit being brought, judgment was entered in favor of the plaintiff, declaring the plaintiff entitled to regular depositors' dividends on the deposit of $1,522.12 in the name of T. C. Swindell, sheriff, and from the judgment the defendant appealed.

Smith & Joyner for plaintiff.
I. M. Bailey for defendant.

CLARKSON, J. T. C. Swindell, sheriff of Hyde County, had on deposit in the Bank of Belhaven $1,522.12 in the name of T. C. Swindell, sheriff. The funds so deposited came into his hands as sheriff and as county funds which he must account for and which he was obligated to pay over to the county of Hyde. C. S., 4270, in part is as follows: "If any clerk of the Superior Court or *any sheriff,* treasurer, register of deeds or other public officer of any county or town of the State shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony."

The Bank of Belhaven became insolvent and its affairs are being liquidated by defendant, Corporation Commission. At the time of closing its doors, T. C. Swindell, sheriff, as before mentioned, had on deposit $1,522.12. T. C. Swindell in his own name had on deposit $9.99. At the time T. C. Swindell was indebted to the bank in the sum of $800 on a note signed by him and as an endorser on two other notes, one for $500, and the other for $370.75, making a total of $1,670.75.

In an action brought by proper officials, judgment was entered against the plaintiff as surety on T. C. Swindell's bond as sheriff on payment of a certain sum and by the judgment plaintiff was subrogated to all the rights of the county in and to the deposit in the Bank of Belhaven of $1,522.12, in the name of T. C. Swindell, sheriff, and which the sheriff was obliged to pay to the county.

It is contended by defendant, Corporation Commission of North Carolina, liquidating agent of the Bank of Belhaven, that it has the right to set-off the $1,522.12 in the name of T. C. Swindell, sheriff, and which the sheriff was obligated to pay to the county, against the personal indebtedness of the sheriff of $1,670.75 due by him to the bank by note and as endorser. We cannot so hold.

The sheriff, if he embezzled it or wrongfully converted it to his own use or corruptly used it or misapplied it for any purpose or failed to pay over and deliver it to the proper party, was guilty of a felony. In the present action the sheriff was obligated to pay it over to the county. This was a trust fund of the most inviolate kind—the fund of a public official.

In *Marshall v. Kemp,* 190 N. C., at p. 493, it is said: "The liability of a public officer differs from that of a trustee or a bailee. The general rule is that an officer who enters into an obligation to account for money received by virtue of his office insures the safety of all funds received by him in his official capacity—insures, as *Justice Rodman* said, against loss by any means whatever, including such losses as arise from the act of God or the public enemy. *Commissioners v. Clarke,* 73 N. C., 255. In *Havens v. Lathene,* 75 N. C., 505, *Chief Justice Pearson* expressed the same opinion by saying that such officer is accountable as a debtor who can relieve himself only by payment. His liability is founded on public policy and the evil consequences which would follow from a less rigid rule as well as on the language of his official bond."

In *Commissioners v. Clarke, supra,* at p. 257, it is said: "It must not be inferred from this, however, that the money belongs to the sheriff, to be dealt with as his own, as a bank deals with its deposits, or otherwise than he is permitted by law."

This rigid rule that public officers are insurers does not ordinarily apply to trustees and bailees, unless made so by special contract. *Sams v. Cochran,* 188 N. C., 731; *Marshall v. Kemp, supra.*

The principle as to set-offs is thus stated in 7 C. J., part sec. 357, pp. 658-9: "In order to warrant a set-off it is of course necessary that the money deposited shall belong to the depositor, and hence the rule does not apply where the bank has knowledge that the moneys are held by the depositor in trust, in his capacity as a public official, or as agent, factor or broker." See *Wilbur v. Mortgage Loan Co.,* 149 S. E., 262 (S. C.).

"A bank having notice that a deposit is held by one for the use of another, or as security for another, has only such right of set-off as is not inconsistent with the rights of the latter. *United States v. Butterworth-Judson Corp.,* 267 U. S., 387, 45 Sup. Ct. Rep., 338"; 50 A. L. R., 633. See *Davis v. Industrial Mfg. Co.,* 114 N. C., 321; *Moore v. Bank,* 173 N. C., 180; *Trust Co. v. Spencer,* 193 N. C., 745.

We think that *Coburn v. Carstarphen,* 194 N. C., 368, 55 A. L. R., 819, is distinguishable from the present action. In the *Coburn case* it affirmatively appears that the treasurer, Carstarphen, was solvent; that as treasurer he was the insurer of the deposit. It was held in *Commissioners v. Clarke,* 73 N. C., 255, that the sheriff was liable although the money had been placed in an iron safe and stolen therefrom. The county was not protesting against the set-off, nor did it claim the deposit. Carstarphen, with the consent of the county, had a right to make the set-off. There was no misapplication unless done with a fraudulent intent. The county looked to the solvent treasurer for payment. The true situation, therefore, was that the loss was surely to fall upon the solvent treasurer and the solvent treasurer, by reason of his proposed payment of the deposit to the county, was the substantial and equitable owner of the deposit and of the right thereunder against the bank.

In the present action the sheriff is insolvent. The county looked to this deposit, which was in the name of T. C. Swindell, sheriff, in his official capacity. It did not belong to him personally, but the county was the *cestui que trust* and the beneficial owner. The sheriff being insolvent, action was brought by the county against him and plaintiff corporation. The action was on the sheriff's bond for a settlement. The county in the adjustment with the plaintiff bondsman of what the insolvent sheriff owed the county, this deposit in the sheriff's name belonging to the county, was taken in consideration. The rights of the county as beneficial owner, in the settlement with plaintiff, was by the judgment practically assigned to plaintiff or plaintiff was subrogated to the rights of the county, the beneficial owner. The bank has no claim against the county, and never did have; its claim was against T. C. Swindell personally. The plaintiff is the equitable owner acquiring its rights from the county in this official's deposit, hence there can be no set-off by the defendant, liquidating agent. Equitable principles depend on the facts of the particular case.

The judgment of the court below is
Affirmed.

L. L. KING v. COMMERCIAL CASUALTY INSURANCE COMPANY.

(Filed 23 October, 1929.)

Insurance R b—In this case held: directed verdict on issue of accidental injury was proper in action on accident policy.

Where the evidence of the plaintiff in his action to recover on a policy of accident insurance discloses that several years prior to the issuance of the policy he had been shot in the foot, the shot remaining in his foot without causing special pain or trouble, and that after the issuance of the policy he had accidentally sprained his ankle, which resulted in inflammation and necessitated an operation for the removal of the shot, and finally made it necessary to amputate the foot, and there is no evidence that the operation necessitated the amputation: *Held,* a directed verdict on the issue of whether the injury was caused by accidental means was proper, though the burden was on the plaintiff to show that his injury was within the provisions of the policy.

APPEAL by defendant from *Harris, J.,* at February Term, 1929, of NEW HANOVER. No error.

On 1 September, 1925, the defendant issued to the plaintiff an accident insurance policy containing this clause: "This policy insures against the effects resulting directly and exclusively of all other causes, from bodily injury sustained during the life of this policy solely through external, violent and accidental means, suicide, sane or insane, not included."

The plaintiff brought suit on the policy and at the trial the following verdict was returned:

1. Did the defendant issue to plaintiff policy No. CD-47164, as alleged in the complaint? Answer: Yes.

2. Did the injury complained of result directly and exclusively of all other causes solely through external, violent and accidental means as provided in said policy? Answer: Yes.

3. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: $1,200 and interest from 1 March, 1928.

Judgment was rendered for the plaintiff from which the defendant appealed, assigning error.

John A. Stevens and Bryan & Campbell for plaintiff.
Rountree & Carr and M. G. James for defendant.

ADAMS, J. The parties agreed that the first issue should be answered in the affirmative and that the third, if the plaintiff was entitled to recover, should be answered $1,200 with interest from 1 March, 1928. Whether the plaintiff was entitled to recover depended upon the answer to the second issue.

As the defendant introduced no evidence the controversy turned almost entirely upon the testimony of the plaintiff. The facts are undisputed. In August, 1927, the plaintiff sprained his left ankle. It swelled and developed into "a kind of reddish purple." In a few days it was examined by a physician and was photographed by the aid of X-rays. The picture revealed a small shot imbedded in the foot just above the toe joint, caused, it was said, by the accidental discharge of a gun in 1909. The shot was removed, but the pain continued. The physician then reopened the incision by which the shot had been removed and made another on the other side of the foot; and on the next day he made four or five incisions. On two subsequent occasions he removed portions of bone and afterwards amputated the foot.

The specific question is whether the plaintiff's injury resulted directly and exclusively of all other causes solely through external, violent, and accidental means. The defendant contends, not that amputation resulting from the sprain alone would not have brought the injury within the terms of the policy, but that the injury resulted from a surgical operation for the removal of a shot on the side of the foot opposite the sprain and that it was not an effect resulting exclusively of all other causes from bodily injury sustained through external, violent, and accidental means; or if this position cannot be maintained that the second issue should have been submitted to the jury. The plaintiff contends, on the other hand, that it is immaterial whether blood poison was caused by the sprain or by the surgeon's act in removing the shot. The trial judge adopted the plaintiff's view of the law and instructed the jury, if they believed the evidence, to answer the second issue in the affirmative.

We have discovered nothing in the plaintiff's evidence from which the jury could reasonably infer that the condition of his foot was due to the imbedded shot or to the incision made for its removal. The shot had been there for several years and had never caused special pain or trouble.

This in effect, according to the evidence, was admitted by the defendant's agent before the policy was issued. The entire defense seems to rest on the theory that infection resulted from the operation to remove the shot, but there is nothing in the testimony to support the theory—no sufficient evidence to this effect. The burden, of course, was on the plaintiff to show that his injury is covered by the terms of the policy; but there is abundant evidence to support this conclusion and none which is so inconsistent with it as to require a new trial for error in the instruction on the second issue. If, however, infection followed the operation for the removal of the shot, it was not the natural or probable result of the plaintiff's act. It was not a result which would ordinarily follow the act, but one attended with an unexpected and unusual result. Vance on Insurance, 566, sec. 232; 6 Cooley's Briefs on Insurance, 5234; *Clay v. Insurance Co.*, 174 N. C., 642.

Our view of the undisputed evidence precludes the necessity of considering the interesting questions of law which under other conditions would have been controlling. We find

No error.

S. W. MORGAN AND W. B. BLADES v. BEAUFORT & WESTERN RAILROAD COMPANY ET AL.

(Filed 23 October, 1929.)

1. **Actions E b—Party invoking process of court may not thereafter seek to nullify proceedings he has invoked.**

   Semble, where the plaintiff in a special proceeding to have the title to his lands registered under the provisions of the Torrens Act has signed the petition, he may not, after the court has proceeded with the cause, enter a special appearance for the purpose of nullifying the very process that he has invoked.

2. **Deeds and Conveyances E a—In this case petitioner could not attack Torrens Proceedings on ground that clerk did not sign jurat.**

   Where the petitioner, to have his title to land registered under the provisions of the Torrens Act has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of C. S., 2384, upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside.

3. **Appeal and Error J c—Where findings of fact do not appear of record it is presumed that court found facts supporting judgment.**

   Where an agreement was signed by one purporting to be an attorney for petitioner in proceedings under the Torrens Act, and the Superior

Court has denied the motion of the petitioner to dismiss the action upon the ground of an invalid jurat apparently issued by the clerk, it will be presumed on appeal that the judge below made sufficient findings of fact to sustain his action in denying the petitioner's motion to dismiss the proceedings, and the petitioner may not sustain his averment that the attorney was not authorized by him to so act, there being no finding to support his contention.

CIVIL ACTION, before *Daniels, J.,* at July Term, 1929, of CARTERET.

This is a special proceeding instituted by the plaintiffs in the Superior Court of Carteret County for the purpose of having title to the lands described in the petition certified and registered under the statute commonly known as the Torrens Act. The petition was signed by both plaintiffs as petitioners on 16 July, 1925, and by Julius F. Duncan, attorney, Beautfort, N. C. The verification of the petition is as follows: "North Carolina, Carteret County: W. B. Blades and Sam W. Morgan, each being duly sworn, deposes and says, each for himself that he has read the foregoing petition; that the same is true to his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true. Sam W. Morgan, W. B. Blades.

"Sworn to and subscribed before me, this 17 July, A. D. 1925. ...., Clerk Superior Court."

It appears that the clerk did not sign the verification or jurat. Thereafter, on 21 September, notice of publication was duly issued by the clerk as required by statute. All parties filed answers. On 25 November the proceeding was referred to the examiner of titles. On 14 May, 1928, an order of survey was made in the cause. On 9 May, 1928, the examiner made a preliminary report, together with an abstract of title to lands set out in the petition. The preliminary report refers to sundry hearings before the examiner and refers to an agreement entered into by the attorneys of record for the parties to the effect that "all titles be merged." The agreement of 15 July, 1927, was signed by the attorney of record for petitioners, Morgan and Blades. This agreement, upon its face, purports to adjust the differences between the parties by dividing the various tracts of land in accordance with the plan set out in the agreement. Thereafter on 2 February, 1929, the petitioner, Morgan, having employed other counsel, entered a special appearance for the purpose of "an arrest of judgment and for dismissal of the action as to the said S. W. Morgan . . . for that the proceedings . . . are void and of no effect . . . in that the original petition was not sworn to by each of the petitioners or either of them and did not contain a full description of the land," etc.

The said S. W. Morgan moves for dismissal of said action on the further ground that he has never employed an attorney in said proceeding and never authorized any one to act for him in said proceedings in filing said petition or making any agreement pertaining thereto, etc.

The clerk of the Superior Court denied the motion and the petitioner, Morgan, appealed to the judge. Judge Daniels heard the appeal and denied the motion. No facts were found by the trial judge. From such judgment the petitioner, Morgan, appealed.

Albert L. Cox and E. H. Gorham for movant, S. W. Morgan.

G. W. Duncan for Perry heirs.

W. B. Rodman, Moore & Dunn and MacLean & Rodman for Railroad Company, appellee.

Julius F. Duncan for Blades, and record attorney in the proceeding for Blades and Morgan.

BROGDEN, J. In a Torrens proceeding, after publication and public hearings before the examiner, and after an agreement has been entered into by counsel of record for petitioner, can one of the petitioners enter a special appearance to dismiss the proceeding upon the ground that the jurat of the clerk did not appear upon the original petition?

At the outset it must be observed that no decision has been called to our attention which permits a petitioner or person invoking the process of a court in his own behalf, and after the court has proceeded with the cause, to enter a special appearance for the purpose of nullifying the very process which the petitioner has invoked. Such a legal position, upon its face, would appear to be illogical and contrary to the practice. The petitioner, however, asserts that the proceeding is void by reason of failure of the clerk to attach a jurat to the original petition. Hence if the petition is void, the court acquired no jurisdiction, and neither the parties nor the land are in court for any purpose. C. S., 2384, requires that "the petition shall be signed and sworn to by each petitioner." In the case at bar the petition was signed by both petitioners and by the attorney of record. In addition thereto, the oath was signed by both petitioners. The oath recites that "W. B. Blades and S. W. Morgan, each being duly sworn, deposes and says, each for himself," etc. It is obvious that when the petitioner, S. W. Morgan, signed this oath it was a solemn declaration on his part that he was sworn even though the clerk failed to sign the jurat. If the record did not clearly disclose that the petitioner, Morgan, by actually signing the oath, asserted that he was duly sworn, a different question might be presented. Furthermore, it appears that an agreement was made and duly signed by counsel representing the parties of record, adjusting the differences involved in the proceeding. This agreement was filed by attorneys on 15 July, 1927, practically two years after the petition had been filed. While the moving petitioner alleges that his original counsel of record had no authority to represent him in the proceeding, yet no evidence is offered to that effect, and there is no finding by the clerk or the trial judge in support of the allegation. If such findings were necessary, nothing else appearing, it is to be assumed that the trial judge found facts warranting the judgment denying the motion for dismissal.

We find no error of law upon the face of the record and the judgment is Affirmed.

STATE v. CHESTER WADE.

(Filed 23 October, 1929.)

Seduction B a—Statement of prosecutrix to physician held not privileged communication under the facts of this case.

Upon the trial under an indictment for the seduction of an innocent and virtuous woman, C. S., 4339, a statement by the prosecutrix to a physician, whom she had consulted, tending to show that she was not innocent or virtuous at the time of the alleged seduction, does not fall within the principle of a privileged communication between physician and patient when made by her after this relationship has ceased, C. S., 1798, and its rejection as evidence by the court is reversible error to the defendant's prejudice, entitling him to a new trial.

APPEAL by defendant from *Cranmer, J.,* at January Term, 1929, of HOKE. New trial.

Indictment for the seduction of an innocent and virtuous woman, C. S., 4339. There was a verdict of guilty. From judgment on the verdict, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-Gneral Nash for the State.

W. H. Cox and J. W. Currie for defendant.

CONNOR, J. Evidence offered by the State on the trial of this action tended to show that at the time she was seduced by the defendant, as contended by the State, the prosecutrix was an innocent and virtuous woman.

There was evidence for the defendant in sharp conflict with the State's evidence with respect to this essential element of the crime charged in the indictment. C. S., 4339. *S. v. Crook,* 189 N. C., 545, 127 S. E., 579. This evidence was the testimony of several young men who each testified to acts on the part of the prosecutrix, which she had denied on her cross-examination by counsel for the defendant. They testified that these acts had occurred prior to the time when the State contended that the prosecutrix was seduced by the defendant. The credibility of these witnesses was sharply attacked by the State on their cross-examination by the solicitor.

In support of his denial of the contention of the State that the prosecutrix was an innocent and virtuous woman at the time she testified that she was seduced by him, defendant offered the testimony of Dr. A. C. Bethune, a physician, with respect to a statement made to him by the prosecutrix as to the paternity of her unborn child. This testimony upon objection by the State, was excluded on the ground, apparently, that the communication of the prosecutrix to the witness was privileged under the statute. C. S., 1798.

The witness testified, however, that the statement was made to him after the relationship of physician and patient between them had terminated. The statement was not made to enable the witness to prescribe for the prosecutrix; it was made after he had advised her that he could render her no professional service with respect to her condition. The statement was not privileged under the statute. The testimony was competent as evidence for the defendant; its exclusion was, we think, prejudicial error, for which the defendant is entitled to a new trial.

There are other assignments of error on this appeal, which counsel for defendant earnestly contend should be sustained. It is needless for us to pass on these assignments, as there must be a

New trial.

E. V. HOWELL, AGENT, v. W. S. ROBERSON, L. D. PENDERGRAFT AND W. A. LLOYD.

(Filed 23 October, 1929.)

1. **Homestead D a—Agreement in note of waiver of homestead is not enforceable.**

   A promise on the face of a note to waive the homestead exemption and to pay attorneys' fees in its collection is not enforceable in this State.

2. **Bills and notes D b—Those who sign note as makers may not show different liability as against holder.**

   An endorser of a note is one who writes his name on the back thereof, C. S., 3044, and one who writes his name, with others, on the face thereof after the written obligation to pay, is prima facie regarded as a maker, and he may not show a different liability as against the holder or payee acquiring without notice, but may show primary and secondary liability as against the other signers of the instrument by sufficient competent evidence. C. S., 2977, 3041.

APPEAL by L. D. Pendergraft from *Cranmer, J.*, at August Term, 1929, of ORANGE. Affirmed.

Gattis & Gattis for W. A. Lloyd.
R. O. Everett for L. D. Pendergraft.

CLARKSON, J. The plaintiff, E. V. Howell, agent, instituted this action against the defendants to recover upon a note executed by the defendants in his favor, as follows:

$1,500.00. Chapel Hill, N. C., 12/13/1926.

Six months after date .... promise to pay to E. V. Howell, agent, or order, without offset, fifteen hundred dollars, negotiable at the Bank of Chapel Hill, N. C.

"For value received, and we, the makers and endorsers hereby waive our benefit to the homestead exemption as to this debt, and agree to continue and remain bound for the payment of this note and all interest thereon, notwithstanding any extension of time granted to the principal, and also waive presentment, demand, protest and notice of same, and agree to pay ten per centum attorneys' fees if collected by law.

No. 1500. W. S. ROBERSON,
Due 6/13/27 W. A. LLOYD,
P. O. L. D. PENDERGRAFT."

It may be noted that the waiver of homestead in the manner set forth in the above note is contrary to the law in this jurisdiction and also the allowance of attorneys' fees.

The contention of Pendergraft was to the effect that he was liable to W. S. Roberson, but secondarily to W. A. Lloyd. The contention of Lloyd was to the effect that Pendergraft and himself "signed the instrument sued on as makers thereof for the accommodation of the defendant, W. S. Roberson, and it is alleged that the defendant, Pendergraft, and this defendant are sureties upon the said note and are jointly and severally liable thereon."

It will be seen from the language of the note "any extension of time granted to the principal" would imply that the other makers were sureties.

Pendergraft contends that he is an accommodation endorser and secondarily liable to his codefendant, Lloyd, in the order in which their names appear on the face of the note, there being no evidence to vary the priority. We cannot so hold.

Under the law in this jurisdiction, all three who signed the note were joint makers and may be so held by the payee or holder of the note. C. S., 2977, 3041. As among themselves, they may ordinarily show by parol their respective liability to each other on the note. Co-principals and co-sureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence. *Smith v. Carr,* 128 N. C., 150; *Carr v. Smith,* 129 N. C., 232; *Lancaster v. Stanfield,* 191 N. C., at p. 343; *Trust Co. v. Boykin,* 192 N. C., 262; *State Prison v. Bonding Co.,* 192 N. C., 391. See *Busbee v. Creech,* 192 N. C., 499. In the present action the defendant, Pendergraft, attempted to show that he was secondarily liable to Lloyd. We do not think the evidence sufficient to establish this fact. There was no evidence sufficient to show either an implied or express agreement with Lloyd that Pendergraft should be liable secondarily to him.

The assignment of error made by Pendergraft: "For that his Honor sustained defendant Lloyd's motion to grant judgment as of nonsuit as to defendant Pendergraft, at the close of defendant Pendergraft's evidence." This cannot be sustained. Lloyd and Pendergraft were both prima facie makers. Pendergraft was not an endorser of the note; he did not put his name on the back of the note. C. S., 3044, 3049. In this jurisdiction it is well settled that a person placing his name on the back of a note is, nothing else appearing, an endorser and liable on the note only as endorser. *Dillard v. Mercantile Co.,* 190 N. C., 225. A person placing his name on the face of a note is, nothing else appearing, a maker and liable on the note as such. The judgment below is

Affirmed.

J. H. PITMAN ET AL. v. FRED HUNT ET UX.

(Filed 23 October, 1929.)

1. **Evidence D b—Testimony in this case held not to be incompetent as communication with decedent.**

   Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of the statute, C. S., 1795, disqualifying a party interested in the event from testifying as a witness in his own behalf as to transactions or communications with a decedent, and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial.

2. **Adverse Possession A f—Tenant may not dispute landlord's title during tenancy or until surrender of possession.**

   Where the relation of landlord and tenant exists, the tenant will not be permitted to dispute the landlord's title, either by setting up an adverse claim to the property or by undertaking to show title in a third person, during the continuance of the tenancy, or without first surrendering the possession to the landlord.

3. Same—Possession of tenant is deemed possession of landlord.

Where a tenant on land takes possession under the title of the landlord, the possession of the tenant is deemed in law the possession of the landlord, and in order for the tenant to acquire title by adverse possession he must show possession for twenty years after the termination of the tenancy under a written lease, or, where there is no written lease, from the payment of the last rent, and if the title is claimed under color, seven years sufficient possession must be shown.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1929, of ROBESON.

Civil action in ejectment.

From a judgment of nonsuit entered on motion of defendants at the close of plaintiff's evidence, the plaintiffs appeal, assigning error.

McKinnon & Fuller for plaintiffs.
Varser, Lawrence, Proctor & McIntyre for defendants.

STACY, C. J. There is evidence on behalf of plaintiffs tending to show that their ancestor and predecessor in title, H. F. Pitman, took a deed for the *locus in quo* on 22 June, 1878, and that the same was duly registered 10 November, 1879. (The description may need to be aided by parol, but this the plaintiffs offered to do. *Bissette v. Strickland,* 191 N. C., 260, 131 S. E., 655.) Thereafter, the said H. F. Pitman placed one Berry Oxendine in possession of the land as his tenant, and plaintiffs offered to show that the said Berry Oxendine remained in possession of said property, as tenant of plaintiffs and their ancestor, for approximately forty years, when, by deed bearing date 19 March, 1927, he undertook to convey the same to the defendants.

All evidence offered by plaintiffs tending to show that Berry Oxendine was first the tenant of their ancestor and later their own tenant was excluded, presumably upon the ground that it violated the meaning and spirit of C. S., 1795, which disqualifies a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his title or interest, from testifying as a witness in his own behalf, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of the deceased person, concerning a personal transaction or communication between the witness and the deceased, except where the executor, administrator or survivor, or person so deriving title, is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication. *In re Mann,* 192 N. C., 248, 134 S. E., 649. But without passing upon this question, which was discussed in *Poole v. Russell, ante,* 246, it appears that some of the witnesses were not interested in the event, and as to their testimony the statute would have no application. We think there was error in excluding all the evidence tending to show the tenancy of Berry Oxendine, which entitles the plaintiffs to a new trial.

It has been the uniform holding with us that where the relation of landlord and tenant exists, and the latter takes possession of premises under a lease from the former, the tenant will not be permitted to dispute the title of the landlord, either by setting up an adverse claim to the property or by undertaking to show that it rightfully belongs to a third person, during the continuance of such tenancy, or without first surrendering the premises to the landlord. *Hobby v. Freeman,* 183 N. C., 240, 111 S. E., 1; *Lawrence v. Eller,* 169 N. C., 211, 85 S. E., 291. And it is provided by C. S., 433 that when the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy, or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent. *Power Co. v. Taylor,* 191 N. C., 329, 131 S. E., 646.

It may be well to add, also, that in actions between individual litigants, as here, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. *Dill Corp. v. Downs,* 195 N. C., 189, 141 S. E., 570; *Power Co. v. Taylor, supra.*

Reversed.

STATE v. ED. McKINNON AND TOM JOHNSON.

(Filed 23 October, 1929.)

1. **Homicide G a—Evidence of guilt of first degree murder held sufficient to be submitted to jury in this case.**

   Circumstantial evidence that the deceased was killed with a stick identified as that carried by one of the defendants; that at the time of the killing the deceased had large amounts of money on his person; that neither of the defendants had money immediately before, but had money thereafter on the night of the killing, with circumstances tending to show a division of the particular money of which the deceased was robbed, and the identity of the pocket-book of the deceased as that seen soon after the killing in the possession of one of the defendants, foot tracks of two persons, one identified as having been made by the boots of one of the defendants; that one of the defendants was seen talking to the deceased just before the killing, is *held,* with other circumstantial evidence in this case, sufficient to be submitted to the jury and to sustain a verdict of guilty as to both defendants of murder in the first degree, the one as the actual perpetrator of the crime and the other as aiding and abetting therein.

2. **Criminal Law I j—Upon motion of nonsuit all evidence should be considered in light most favorable to the State.**

Upon defendant's motion as of nonsuit (C. S., 4643), made after the close of the State's evidence and renewed after the close of all the evidence, all the evidence which tends to prove the defendant's guilt will be considered in the light most favorable to the State, and in this case *held:* the evidence, although circumstantial, raised more than a conjecture, scintilla or suspicion, and was sufficient to be submitted to the jury, the probative force being for them.

3. **Criminal Law G d—Error, if any, in the admission of certain testimony in this case cured by testimony of other witnesses to same effect.**

Where the identity of the defendant and the loss by the deceased of his pocket-book on the day of the crime have been established by the testimony of competent witnesses, incompetent testimony of another witness to these facts thus established is immaterial under the facts of this case, and the admission of the incompetent testimony is not held for reversible error.

4. **Criminal Law I g—Refusal of requests for instruction substantially given in charge is not erroneous.**

Where the requests for instruction by the defendant are substantially contained in the charge, the refusal of the trial court to give the particular instructions requested will not be held for error.

5. **Same—Inadvertence in charge as to contentions of party should be called to the attention of the court in apt time.**

Where the judge in his charge to the jury inadvertently misstates a contention of the defendant in one particular, the inadvertence should be called to his attention before the jury retires, and under the circumstances of this case where the judge warned the jury not to be governed by his recollection, but by their own, the appellant's assignment of error in this respect cannot be sustained.

6. **Criminal Law C a—One aiding and abetting commission of murder is guilty as principal.**

One who is present when another commits a capital felony with the knowledge of the other, and does some act to render aid in the perpetration of the crime, is guilty of the offense as an aider therein, though he takes no direct share in its actual commission, and when present advising, instigating or encouraging the other to commit the crime, is guilty as an abetter therein.

APPEAL from *Daniels, J.*, and a jury, at July Term, 1929, of DUPLIN. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

D. M. Jolly for Ed. McKinnon.

D. L. Carlton and Murray Allen for Tom Johnson.

CLARKSON, J. The defendants were convicted of the murder, in the first degree, of J. H. Boney, and sentenced by the court below to be electrocuted. The State's evidence tended to prove that J. H. Boney was a strawberry grower, 66 years old, living near Tin City, in Duplin County. He had a great many negro strawberry pickers who came from nearby places to pick strawberries, among them the defendant, Ed. McKinnon. He furnished the pickers houses to live in. On Thursday, 25 April, 1929, J. H. Boney was discovered dead about 11 o'clock at night, at the rear end of his pack-house or barn, about 25 yards back of his house, face down in a mud hole. No pocket-book was found on him. He had $6.60 in change in his pocket—two or three bills and some silver. "When found he had been dead about two or two and a half hours." He was struck six times, first across the head and cut in the head about three and a half inches and struck on the back and cut another about three and a half inches on the back of the head; both jaws were struck on each side and he was struck on the neck and across the arm. There was not a whole bone in his head. The physician who examined him said "the wounds were made with a blunt instrument—a blunt smooth instrument, in my opinion. It could have been made with a stick like this," the stick introduced in evidence found near the body with hair and blood stains on it.

The evidence to connect two being present when the crime was committed: About 30 feet from the body a stick was found where it was thrown in some dog fennel which was holding it up, with Boney's hair on it and stains of blood. "Tracks led from the body in the direction of the stick, one with shoes and one with rubber boots, two men's tracks. After passing the tracks led across the edge of the strawberry patch" towards the shanty where McKinnon stayed. Did not go with the path, "but went across the field four feet apart running side by side." The boots admitted by McKinnon to be his, "put one boot in the track, and it fit as fine as you ever saw."

The evidence to connect Ed. McKinnon with the crime: Boney had a brown folding pocket-book, like one shown on the trial bought at the same store. On Wednesday before he was killed on Thursday night, he lost this pocket-book in the strawberry patch where Ed. McKinnon and the other negroes were picking berries at the time. It was in evidence that McKinnon asked how much money was lost and was told $800. The pocket-book was found by his son about 3 o'clock in the afternoon—an hour after it was lost. It contained about $800, mostly $20 and $10 bills, and a peculiar gold coin. His son would haul the berries and give his father the money. Boney was seen by his son at 6 o'clock, about dark, 50 or 75 yards from his house, on the evening he was killed, and had the pocket-book in his pocket with a stack of strawberry checks, when his son went with others to the river, about three miles away, to fish. Some of the women pickers stayed in the barn, or pack-house, in the edge of the yard; they lived upstairs and the stables were underneath. About 200 to 300 yards, almost directly behind the pack-house in the woods, Ed. McKinnon stayed in a shanty—two rooms. The women in one, men in the other. About 6 o'clock the evening Boney was killed, McKinnon was at Hall filling station with a stick in his right hand exactly like the one which was found near the body, which when found had hair and blood stains on it. "I saw him as much as 2 or 3 times with that very stick." He wore at the time overalls, rubber boots and wide-brim hat. Before that day he wore a wide-brim hat and a handkerchief around his neck, and the negroes called him "cow boy." He was without money that evening; had lost his money and was going to borrow some from Boney, and was seen going in the direction of Boney's house about 6 o'clock in his boots and overalls. Early next morning after the killing, witnesses testified: "Tracks led from the body in the direction of the stick, one with shoes and one with rubber boots—two men's tracks. After passing the tracks led across the edge of the strawberry patch" towards the shanty where McKinnon stayed. Did not go with the path, "but went across the field four feet apart running side by side." The boots admitted by McKinnon to be his "put one boot in the track and it fit as fine as you ever saw." The tracks were followed to within 75 or 100 yards of the shanty. Boney was knocked down in a mud hole. Rubber boots were found about twenty steps from where the path led out to the front of the shanty. The woods were back of the shanty and the boot tracks twenty steps from the woods. McKinnon was at the shanty when they were found and said he pulled them off and left them there as he dressed to go to the picture show the evening before. "I turned a boot over with my foot and there was some red clay on it. It looked like blood, but it was not blood, but pure red clay from off that hill." McKinnon, on his return from the movie with the negro girls, about 11:30 o'clock that night, was at Boney's and heard the tale of the crime, but did not go near the body, but went immediately to the shanty. Witnesses who slept in the shanty said that McKinnon came in the night of the killing; "heard him burst the latch from the door as he came in," and said that Mr. Boney was dead; some one killed him; he did not know who did. "I believe I will leave," and he was advised not to do so. When he came in something was in his hand; "looked like a paper rolled up; it was brown." Another witness said "It looked like a pocket-book and was the color of that one." He had a black pocket-book in his hand; "it was a long one and opened on one side; had no money in it." McKinnon "had a splinter in his hand and fired it when he came in the house." Search was made and no money or pocket-book was found in the house or on McKinnon, who was arrested early next morning.

A rural policeman testified that defendant, Tom Johnson, made a voluntary statement to him. "He said he was over in the field adjoining some woods on the Boney farm; seems like it was a fish pond, and said that Ed. McKinnon came on. It was the night of the murder. He followed Ed. McKinnon thinking he had some whiskey, and when he walked up to Ed. McKinnon in the woods he had five or six piles of money; looked like $100 to the pile. He asked him where he got it, and McKinnon said he got it off his boss man, and said McKinnon promised to give him some if he would not tell it, and about that time there was a rustle in the bushes and McKinnon thought somebody was coming, and grabbed it and got all but one pile and he, Tom Johnson, grabbed the other pile, and put three $10 bills in his socks and carried the other and put it in his trunk, and then he heard the officers were going to search the house and he was advised by George McCray to move it out, and he moved it out and put it in a pile of stove wood near the house, and when he went back for it it was gone. He said that George McCray was the only one who knew where it was. I (the rural policeman) asked him for the gold money, and he said that after he found out they were looking for it, he decided that he had better throw it away, and threw it in a branch near the house. Tom (Johnson) said he was lying on the ground with the other money when McKinnon ran, and that he picked up $90 in all."

Evidence to connect Tom Johnson with the crime: He did not work for Boney, but picked strawberries a week and a half on another nearby farm. He had no money, and left the next day after the killing, after paying his employer one dollar he had borrowed from him. "Tracks led from the body in the direction of the stick, one with shoes and one with rubber boots—two men's tracks. After passing the tracks led across the edge of the strawberry patch" towards the shanty where McKinnon stayed. Did not go with the path, "but went across the field four feet apart and running side by side." The boots admitted by McKinnon to be his "put one boot in the track and it fit as fine as you ever saw." Johnson testified that he saw McKinnon "over in the edge of the field adjoining some woods on the Boney farm." Got some $90 in all. He threw the piece of gold coin away. Boney's daughter testified this was a peculiar coin given her father, and one like it given her, while on a trip through Maryland, with a Bible verse on it like the one shown in evidence. Witnesses testified to the peculiar make when seen in Johnson's possession and like the one Boney's daughter had and shown in evidence. A witness testified: "I live at Lumber Bridge and know Tom Johnson. I picked berries for Mr. Boney; left on Monday night before he was killed on Thursday night. I saw Mr. Boney with a gold coin like that; kept it in his pocket-book; brown folding book, like that one you have.

On Friday night Tom Johnson came to my house at Lumber Bridge. My husband and I had retired. Tom Johnson came there about 3 o'clock Friday night and said 'It's on at Tin City.' He said that Mr. Boney got killed, and he sat on the edge of the bed and pulled out three $10 bills; one of them was green on one side and yellow on the other, and he ran down in his pocket and pulled out two 50-cent pieces and a gold piece. It looked like that one. My husband asked him where he got that money, and he said he throwed his boss man for it, and he said that George McCray stole $90 from him. Tom said he was going to Fayetteville and buy a pistol and come back and kill George, and he went on to tell how long the stick was, and said that Mr. Boney had been hit six times. He said the stick was that long, and big at one end and little at the other. He said he knew who killed him, and if he had to tell it he would tell it."

Prior to and at 8:10 o'clock the night of the killing, Tom Johnson was there talking to Boney at the rabbit pen, between his house and the pack-house. That night at the show at Wallace "I saw Tom Johnson with two pockets full of money, but I don't know how much he had." There were others who saw him that night at the show and hobby-horses with money in bills. Johnson said he started to the show from Tin City about 8:30 to 9 o'clock. It was in evidence that the sun set on 25 April, 1929, at 6:40 p.m.

Both the defendants denied that they killed Boney. McKinnon introduced evidence tending to show that he was at the moving picture show in Wallace at the time Boney was killed. It took about a half hour to walk from the pack-house to the movie at Wallace—from Boney's house to Wallace was about one and one-fourth miles. McKinnon's party of negro girls had gone on before. McKinnon had gone to the shanty to change his clothes and overtook them; he then had on tennis shoes and light grey hat. The show opened at 8:15 to 8:30, and McKinnon and his crowd were a few minutes late. One of the negro girls who stayed in the pack-house, testified, speaking of McKinnon: "I asked him if he was going to the show, and he said he had lost his money, and if he could borrow some money he was going to the show. He said he was going to borrow some money from Mr. Boney. He went back and dressed, and stayed too long, and we went and left him, and he got mad about it. He went back home, saying he was going to borrow some money and dress, and stayed too long, and we went on and he caught us at the last house at Tin City and went on to the show; he was running when he caught up with us. He was drinking when he caught up. I asked him what was the matter, and he said he was tired; that he had been drinking a little bit." McKinnon testified that he only had $1 that night and in telling people in the shanty about Boney being killed he was not excited. He also explained the circumstances relied on by the State, and denied what Johnson testified to in regard to the money.

It was the contention of the State that Boney was killed between 8:30 and 9:00 o'clock; that McKinnon killed him, and Johnson was present aiding and abetting him; that McKinnon robbed him, threw the stick in the dog fennel patch, and they both ran towards the shanty and divided the money hurriedly in the woods; McKinnon left his rubber boots near the shanty, quickly changed his clothes and put on tennis shoes and caught up with the negro girls running, and they entered the movie late. The distance from the shanty was only a little over one and one-fourth miles to the movie. Johnson went to the movie that evening and was seen with two pockets full of money, which he testified he got from McKinnon, which was before he (Johnson) went to the movie. That night on his return with the negro girls, about 11 o'clock, McKinnon did not go to where Boney's body was lying, but went to the shanty immediately, burst the door of the shanty open, showed a pocket-book like Boney's and wanted to leave after telling about Boney being killed, but was persuaded not to do so.

The defendants, at the close of the State's evidence, and at the close of all the evidence, moved to dismiss the action or for judgment of nonsuit. C. S., 4643. These motions cannot be sustained.

"On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. 'An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt.' *S. v. Earp,* 196 N. C., at p. 166. See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility and sufficiency of evidence is for the court to determine, the weight, effect and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899. The evidence in the case was circumstantial." *S. v. Lawrence,* 196 N. C., at p. 564.

The evidence, though circumstantial, is sufficient to be submitted to a jury. It is more than a conjecture, a suspicion or a scintilla—the probative force is for the jury.

In regard to the evidence against McKinnon, as to every link in the chain of circumstances the court below recited the evidence pro and con and charged the jury: "If you are so satisfied beyond a reasonable doubt, then you would consider that circumstance, otherwise you would disregard it," and charged "These are the circumstances relied upon by the State as to McKinnon, and our law lays down certain rules governing juries in the consideration of circumstantial evidence. Our Court has said that circumstantial evidence is a necessary and useful means for the ascertainment of truth. But it says further that the juries shall consider against the defendant, no circumstance unless it is established to their satisfaction, from the evidence beyond a reasonable doubt. They shall take all the circumstances that they find to be so established, and take them together, and if they lead their minds to a moral certainty or beyond a reasonable doubt of his guilt, then they will convict. But this other rule is laid down, that if the jury can explain the circumstances upon any other reasonable theory, than that of the guilt of the defendent, it is their duty to do so, in the interest of human life."

In regard to the circumstantial evidence against Johnson, the evidence was recited by the court below and the charge was as follows: "These are circumstances, upon which the State relies for the conviction of Tom Johnson, and I give you the same charge as I gave you in regard to the circumstantial evidence in reference to McKinnon. Treat these circumstances the same way. Consider only those that you find to be established beyond a reasonable doubt. Consider them together, and if they lead you to a moral certainty or beyond a reasonable doubt as to his guilt, you will convict. If not, you will acquit. If you can explain the circumstance alleged against Johnson by any other reasonable theory, other than that of guilt, it is your duty to so explain them." We think the charge is fully sustained by authorities in this jurisdiction.

The contention of defendant McKinnon is mainly as to the sufficiency of evidence. The exceptions and assignments of error as to the witness testifying as to the loss of the pocket-book, we think, immaterial. She testified, "The pocket-book was lost in the field, but I don't know what day it was. Q. Did you know it was lost? They said it was lost." The testimony that followed showed beyond question that it was lost and found the day of the killing and McKinnon knew it. Nor to the testimony of the witness in describing the man in Tin City the afternoon before Boney was slain. In answer to the question he said, "He was about the same size and he had on boots and a pair of overalls. He was dressed like they said he was; I just noticed that." The witnesses that had testified prior identified both McKinnon and the stick positively.

The contention of defendant Johnson, is the refusal to give the following instructions: "1. If the jury should find from the evidence that the defendant, Tom Johnson, saw a man out in the road in front of him, and knew who he was, and he whistled at him and he ran out into the edge of the woods and found him counting some money, and the man took fright and ran, leaving a part of the money, and the defendant Tom Johnson picked up the money and appropriated it to his own use, the said defendant would not be guilty of any crime, unless it was for larceny and receiving. 2. If the jury believe from the evidence that Tom Johnson followed the defendant, Ed. McKinnon, out into the edge of the woods and found him counting money, and Ed. McKinnon took fright at some noise he had heard and left part of the money he could not be guilty of higher offense than the crime of receiving stolen property."

We think this request was given substantially in the charge as follows: "The defendant, Tom Johnson, could not be convicted upon this bill of indictment, if you are satisfied of the truth of his evidence that he went into the woods and found somebody there with money, who said that it had been found and that the man ran away and he picked it up and carried it off. If that is true, that would not even constitute a circumstance against him. You might find that he might be guilty of receiving stolen money, but he is not indicted for larceny." The court below, in regard to Johnson, stated: "The State contends that he was seen in the yard of Mr. Boney at 8:10 the night of the homicide. Mr. Thompson, son-in-law of Mr. Boney, testified to that, and Johnson himself admits that." Johnson, defendant, contends that not only did he not admit that he was with Mr. Boney at 8:10 the night of the homicide, but expressly denied this fact in the following language: "I was not sitting on the rabbit-box talking to Mr. Boney at ten minutes past 8 o'clock the night he was killed. It was not me he was talking to. If Mr. Thompson said he saw me there he is mistaken. I was there in the afternoon part, or first part of the evening. George McCray and all of us boys left there together. Mr. Thompson did not see me. I used to go nights to see my girl. I heard Mr. Boney had lost his pocket-book the night he was killed."

The court had prior recited the evidence as follows: "Now, as to the other defendant (Johnson) the State has offered evidence that he was seen talking to Mr. Boney by his son-in-law, Mr. Thompson, at 8:10 that night in his yard; that Mr. Boney was sitting on a rabbit-box and the defendant, Johnson, standing by his side; that he, Thompson, went into the house and that he never saw Mr. Boney any more until he was killed out at the pack-house and found him lying there in the path dead."

The court had prior charged the jury: "As I recall it, that is substantially the testimony in the case. You are not to be governed by my recollection of it, however, but by your own. The counsel have kindly relieved me from the necessity of reading all my notes to you, but suggested that I undertake to summarize it, as I have tried to do. But, if I have left out anything, you will recollect it and consider it with all the evidence, as you recall it."

Defendant Johnson did not request the court below to correct the inadvertence at the time it was made.

The defendant Johnson admitted he was there the "afternoon part or first part of the evening." In a long trial, where there were so many witnesses as in the present case, it is natural that what a witness says may be inaccurately stated from memory. The time Johnson admitted he was there was stated by the court, inadvertently, as the time fixed by Thompson, although Johnson had been there the early part of the evening. This inadvertence should have been called to the attention of the court. To illustrate the wisdom of this, in this case the attorney for defendant McKinnon called attention to an inaccuracy stated by the court in regard to certain testimony in reference to McKinnon. The notes of the evidence were immediately referred to and correction made. The court below warned the jury "not to be governed by my recollection of it however, but by your own." The inadvertence was to a contention. The assignment of error cannot be sustained. *S. v. Geurukus,* 195 N. C., 642.

In the first part of the charge the court below charged the jury: "There arises a presumption of innocence in the defendant's favor, and he ought not to be convicted until all the evidence, fairly considered, satisfied the jury beyond a reasonable doubt of his guilt." And the latter part of the charge: "The law presumes that every defendant when placed on trial on a criminal charge is innocent, and this presumption goes with the defendant through the trial and remains with him until the State has produced evidence which satisfies the jury beyond a reasonable doubt, that he is guilty. If you have a reasonable doubt as to the guilt of either of the defendants, you will acquit that defendant. If you have reasonable doubt as to the guilt of both of them, you will acquit them both. The credibility of the evidence is a matter for the jury to determine under the evidence in the case, what credit or what weight, if any, you will give the evidence of the witnesses. In determining this question, it is your duty to take into consideration the demeanor of the witness on the stand. It is proper for you to take into consideration in passing upon the credibility of any witness, the offenses which he admits he had been guilty of, and you have a right to take into consideration all he says, in order to enable you to determine what weight you give the testimony."

The court below charged the jury: "If the evidence satisfies you beyond a reasonable doubt that both defendants were present at the time the fatal blows were struck and that they were struck for the purpose entertained by both defendants of robbing the deceased, and in attempting to perpetrate such robbery, one of the defendants struck the blows that caused the death of the deceased and that at that time the other defendant was present, to the knowledge of the defendant who struck the blows, for the purpose of encouraging or aiding and abetting in the commission of the robbery, then both defendants would be guilty of murder in the first degree. A person aids when, being present at the time and place, he does some act to render aid to the actual perpetration of the crime, though he takes no direct share in its commission. An abetter is one who gives aid and counsel, or who either commands, advises, instigates or encourages another to commit a crime—a person, who by being present, by words or conduct, incites another to commit the criminal act, or one who so far participates in the commission of the offense as to be present to the knowledge of the person actually committing the crime for the purpose of assisting, if necessary." We think there was sufficient evidence as to aiding and abetting, and the charge fully borne out by authorities. *S. v. Baldwin,* 193 N. C., 566; *S. v. Lambert,* 196 N. C., 524.

The court below charged fully the law of murder in the first and second degrees and manslaughter, and every phase of the law bearing on the evidence.

From a careful review of the evidence, we think it was sufficient to be submitted to the jury as to both defendants—the probative force was for them. We can find no error in law.

No error.

LEE WATSON, BY HIS NEXT FRIEND, JOSIE WATSON, v. WARSAW CONSTRUCTION COMPANY.

(Filed 23 October, 1929.)

1. **Master and Servant C d—Failure to warn servant is not ground for liability for injury occurring after termination of employment.**

   Where the *alter ego* of a principal orders an employee whose regular duty is to haul dirt for the construction of a highway, to take a box of dynamite caps to a tool-house, and fails to warn the servant of the danger in connection therewith, and the employee takes the box of caps to the tool-house in his pocket and deposits the box there, about a half hour being required therefor, and on the next day the employee is injured by an explosion supposed to have been caused from dynamite caps remaining in his pocket: *Held,* the master is not liable in damages for the failure to warn the servant, the injury having occurred after the particular employment had terminated.

2. **Negligence A d—In this case held: injury could not have been reasonably foreseen and defendant is not liable therefor.**

   Where the *alter ego* of a principal gives an employee a box of dynamite caps to take to a tool-house, and the lid of the box is sprung, allowing, from conjecture, some of the caps to escape from the box into the pocket of the employee, where they exploded the next day: *Held*, the defendant cannot be held to have reasonably anticipated that any harm would result from the fact that the lid of the box was sprung, and he is not liable in damages for the injury resulting therefrom.

3. **Negligence A a—A person is under duty to use care commensurate with danger.**

The degree of care which a person is required to exercise in a particular situation to absolve himself from the imputation of negligence may vary with the obviousness of the risk; but with respect to his liability, the ultimate question is whether he exercised due or commensurate care under the circumstances. The former doctrine of degrees of negligence disapproved.

APPEAL by defendant from *McElroy, J.*, at March Term, 1929, of SWAIN. Reversed.

The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the explosion of dynamite caps negligently put into his possession by the defendant.

The defendant is a corporation, and at the time of the injury was engaged in blasting and grading a roadbed for a highway to be built from Hazel Creek in Swain County to the Tennessee line. The plaintiff had been in the employ of the defendant for two or three years, and prior to that time in the service of the defendant's predecessor. When injured he was the defendant's teamster. He was 18 years of age and weighed 90 or 95 pounds. His foreman was A. W. Whaley. His account of the injury follows: "I had been hauling for Warsaw Construction Company about two or three months. Mr. Whaley gave me and the other members of the crew orders and directions what to do. I kept my team near the river in a barn where I had been ordered by the company and Mr. Whaley to keep the team. The barn was pretty close to the highway. I was hauling dirt for the Warsaw Construction Company on the afternoon of 2 February, 1928. I went to the barn to put up my team. I was there doctoring my mule—doctoring his shoulder—and Mr. Whaley came and called me. I went by the name of Jack; he called my name and said, 'Here is a box of caps and a roll of fuse. I want you to carry it to the little shack and put the caps and fuse up over the door.' I told him all right, and he said that would be all right. I told him that just as quick as I got through doctoring my mule I would go. He said that will be all right. I laid the fuse down on the ground and put the caps in my pocket. I was wearing overalls. I put them in the right pocket. Mr. Whaley was standing there present when I put the box of dynamite caps in my pocket. He didn't say anything. He didn't give me any instructions or any warning as to the danger of the caps or explosives. He made no statements about it at all. It took me something like 10 or 15 minutes to finish up my work there. After I did that I went on and done what he told me—put up the caps and fuse. The little house he ordered me to put them in was kind above the highway, right on the side of the highway, something like 75 or 100 feet from the barn. I put them up over the door like he said. There was dynamite, tools, leather and so forth and so on in that house. The house was not locked where the dynamite was kept. The door was open. After I put the caps, the box of caps, and the fuse, where I was ordered to put them, I went on to the house, to my boarding place. I was wearing loose overall pants. The shack was 100 feet from the barn. When Mr. Whaley gave me the dynamite caps he didn't tell me how many were in the box. After he gave me the roll of fuse and caps he went on to the house, I suppose. He went that way. The next day I was hauling pipe for him, for the Warsaw Construction Company, under the instructions of Mr. Whaley. I hauled two loads of pipe and got in about 1:30 and ran to the house and ate dinner and hurried back and started to haul another load, and Mr. Whaley called me and wanted me to move a pump down to the river to the little ferry. I took one mule and moved the pump to the boat and brought the mule back and hooked it into the wagon, and when I hooked it up I got on one side of the wagon and looked down and saw my whip on the ground, and I jumped down to get it, and when I hit the ground it fired. I don't know what it was that fired. The explosion occurred just as I hit the ground. It knocked me kind of backwards. I ran backwards to keep from falling, and I thought I could come straight. Mr. Luck was standing over from me; I thought I could walk to him, but I couldn't. I went around and around and fell backwards in the road and then raised up and saw that my leg was torn up. The leather lines were shot in two. My pants were shot all to pieces."

This is his description of the box containing the caps: "The box Mr. Whaley gave me was kind of a square box, about an inch and a half broad and about an inch and a half all the way. This is broader on this box than what he gave me. The lid on the other box was narrower than this. This shuts down tighter than the other one. It is broader. I put the box he gave me in my right overall pocket. I didn't know any caps had come out in my pocket. The lid would come off easy on that box. I didn't know they would come out in my pocket. I observed that the corners of the cap box he gave me were loose. They were loose in the corners like that. They were not fastened together." . . . "To the best of my knowledge the lid was sprung on the box that he gave me. After he gave me the box and I went up to the house, I didn't put my hand in my pocket. When I took the box out of my pocket the corner of the lid was raised up. When I took it out it pushed back on."

Speaking of the caps he said: "I put them down in my pocket, then took them to the shack. I put my hand in my pocket and took them out and put them up. I put up all that he gave me. . . . I didn't know I had any dynamite caps in my pocket. From 5 o'clock that evening after I took the dynamite caps and put them up I never had my hand in my right-hand pocket till the next day when I got hurt. I could have put my hand in my pocket and found out what I had, but I didn't, that I remember. The best I remember I didn't put my hand in there, for if I had I would have found something. When Mr. Whaley handed me the box of dynamite caps I didn't notice it; I just put it in my pocket. I glanced over the box and put it in my pocket. I didn't notice anything about it when I glanced over it. That was after I took it out of my pocket that I noticed one corner of the lid was raised. That was in broad daylight. When I took that box out of my pocket and noticed that the lid was pulled up, the foreman was not present and he didn't know anything about it. If the lid was pulled up and some of the caps had slipped out of the box, I never thought anything about it. I just put them up. I just pushed it back down a little. I never thought there was any caps in my pocket. I reached my hand in my pocket and then noticed that the lid was slipped up or had come off, but it went back on and I set it up. Seeing and knowing that, I didn't put my hand in my pocket to see if any of the caps had come out. I never thought about it."

Other witnesses were examined, but the plaintiff's testimony is for him the most favorable. At the close of the plaintiff's evidence and at the conclusion of all the evidence, the defendant moved for judgment as of nonsuit. Each motion was denied and the defendant excepted.

The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff, and he was awarded judgment, from which the defendant appealed upon error assigned.

Sutton & Stillwell for plaintiff.
Edwards & Leatherwood for defendant.

ADAMS, J. At 5:30 in the afternoon of 2 February, 1928, the plaintiff received the dynamite caps from the defendant's foreman and was injured by an explosion in his pocket on the day following at 1:30. The material allegations of negligence, as set forth in the complaint, are the defendant's failure to warn the plaintiff of danger in handling the caps and its failure to provide a safe box or container for their transportation. Let us consider each of these allegations in its relation to the plaintiff's evidence.

As to the first, it is conceded to be the duty of an employer to warn his employees concerning dangers which are known to him, or which in the exercise of reasonable care should be known to him, and are unknown to his employees or are undiscoverable by them in the exercise of due care, and concerning dangers which, by reason of youth, inexperience or incompetency the employees do not appreciate. Under these conditions unless the servant is warned or instructed he does not assume the risk of such dangers, and if without fault or negligence on his part he receives an injury in consequence of not having been warned or instructed the master will be liable to him in damages. *West v. Tanning Co.*, 154 N. C., 44; *Norris v. Mills, ibid.*, 474; *Steeley v. Lumber Co.*, 165 N. C., 27, 34.

For the present purpose, we may admit the proposition that where explosives are given to a messenger for transportation in a package apparently harmless, and he has no information or notice of their general character, and carries them with the care adapted to their apparent nature, the person delivering the explosives will ordinarily be held liable for injuries resulting from an explosion during the period of transportation. But without saying that the jury may not reasonably have inferred from the evidence that the defendant had been negligent in failing to warn the plaintiff of probable harm, we are confronted with the fact that no injury resulted to the plaintiff during the course of his employment—*i. e.*, during the time he was engaged in obedience to the foreman's orders in carrying the caps from the barn to the shack. His regular service was that of a teamster. The reason of requiring warning in appropriate cases is to impress upon the employee the necessity of keeping the danger in mind while performing the specific duties required of him and to give him information by which to determine whether he will continue in the service. 39 C. J., 489. As a rule an employer will not be liable for failure to instruct an inexperienced or ignorant employee unless the injury sustained during the employment resulted from the employee's unskillfulness or want of knowledge.

With respect to the caps and the fuse the plaintiff's employment ceased, as we have indicated, when he put them in the house. He had nothing more to do with them. His service was of short duration: not more than thirty minutes intervened between the time he received the caps and the time he put them on the shelf. No accident or injury occurred on this short journey or while the particular employment continued. If the object of warning is to save the employee from injury while engaged in the service for which he is employed, the employer's failure to warn him will not, as a general principle, be held for actionable negligence where no injury is sustained during the continuance of the service, and will not be regarded as having contributed to an injury which did not occur during the period to which the instruction was intended to apply. *Mitchell v. R. R.*, 176 N. C., 645; *Wilson v. Clark*, 110 N. C., 364; *Mather v. Rillston,* 156 U. S., 391, 39 Law Ed., 464. For these reasons the plaintiff's first position cannot be maintained.

The second proposition advanced by the plaintiff raises the question whether the defendant failed in another respect to exercise due care for his safety.

The defendant had a right to assume that the plaintiff would obey the foreman's instructions and leave in the house all the caps the foreman had given him. To meet this situation the plaintiff avers that the defendant negligently failed to provide a suitable container, and that on account of a defective lid five or six caps came out of the box while it was in the pocket of his overalls, and without his knowledge remained there until the explosion occurred in the afternoon of the day following. He contends that his right to recover damages is not dependent upon the existence at the time of the injury of any contractual relation between him and the defendant. His allegation is this: "The plaintiff noticed when he took the box from his pocket at the shack that one corner of the tin or copper lid was slipped up slightly, but did not know that any of the said caps had come out of the box into his pocket." Elsewhere in the complaint he refers to the box as "containing one hundred caps and being made of tin with a loose and springy lid thereon." Upon his allegations he rests the contention that the defendant by its foreman, while the temporary relation of master and servant existed, negligently put in operation a dangerous agency which, continuing after the relation had ceased, caused an explosion which resulted in his injury. These allegations in their relation to the evidence must be considered in the light of familiar principles underlying the law of negligence.

The relation between the conception of negligence and liability in the field of trespass involves three propositions: (1) "For intentional injury done by the direct application of force a man is absolutely liable. (2) For injury done by the direct application of force under such circumstances that the law can ascribe to the actor an intention to do the harm, he is also absolutely liable. (3) But where the actual intention is absent and the circumstances are such that the law will not raise a presumption of intention against the actor, there liability cannot exist unless negligence, in the sense of some degree of blameworthy remissness or lack of care on the part of the actor is shown. In other words, negligence is essential to liability for unintentional injury, and it is a good defense in an action of trespass for unintended harm for the defendant to show that he was in no way negligent or to blame in doing the act which proximately caused the damage." 1 Street's Foundations of Legal Liability, 74.

The essential elements of actionable negligence may be stated as (a) a failure to exercise commensurate care, (b) involving a breach of duty,

(c) resulting proximately in damage to the plaintiff. Hale on Torts, 449; Jaggard on Torts, ch. 12, sec. 246. The degree of care required of persons having the possession and control of dangerous explosives has been variously defined as "the utmost," "the highest," "reasonable," and "commensurate." *Brittingham v. Stadiem,* 151 N. C., 299; 25 C. J., 185. But in modern legal thought the notion that there are degrees of negligence is not approved. In *Wilson v. Brett,* 11 M. & W., 113, *Rolfe, B.,* assailing the propriety of distinguishing such degrees, insisted that negligence in any degree is merely negligence—a statement of the law to which our own decisions conform, except perhaps in reference to the law of bailment. *Hanes v. Shapiro,* 168 N. C., 24. It is said in *Ridge v. R. R.,* 167 N. C., 510, 526, to be "generally conceded that there is no classification of negligence with respect to the degree of care required in any given case, as being slight, ordinary, and gross, as such a distinction can serve no practical purpose and is often very misleading. *Steamboat New World v. King,* 16 How. (U. S.), 469, 475; *Milwaukee, etc., R. Co. v. Arms,* 91 U. S., 489; 8 Enc. of U. S. S. C. Reports, pp. 878, 879, and notes." Also that "the requisite degree of care to be employed is that which is suited to the particular transaction being investigated, and reasonably commensurate with its circumstances and surroundings, that being supposed to be the care which any man of ordinary prudence will use, as dictated to him by a natural sense of his own protection and safety, if his personal rights were involved." And in *Commissioners v. Jennings,* 181 N. C., 393, 400: "Counsel discussed before us at some length the difference between ordinary care, the highest degree of care and gross negligence, but we deem it unnecessary to draw any distinction between them. It is all but ordinary care, which means that degree of care which a man of ordinary prudence would use in the same or similar circumstances." The degree of care which a person is required to exercise in a particular situation to absolve himself from the imputation of negligence may vary with the obviousness of the risk; but with respect to his liability the ultimate question is whether he exercised due or commensurate care.

There is no substantial basis for the plaintiff's contention that the defendant did not exercise the required care in providing a suitable container for the caps. It is generally held that "reasonable foresight of harm supplies the criterion for determining the preliminary question whether negligence exists in a particular case." The defendant contends that under the circumstances related by the plaintiff it could not reasonably have anticipated or foreseen the infliction of any injury. According to this theory foresight of harm is a condition of liability, the test of the defendant's negligence being whether in the exercise of due care it could have foreseen, not necessarily the specific injury sustained, but consequences of a generally injurious nature. While a person may be charged with knowledge of that which as a reasonably prudent person he should have foreseen, he is not under any duty to foresee what a reasonably prudent person would not have foreseen, or under any obligation to provide against a danger he would not reasonably have anticipated. In *Carter v. Lumber Co.,* 129 N. C., 203, 209, it is said: "No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care under all the circumstances, have foreseen that it might result in damage to some one. 16 Am. & Eng. Enc., 439; Pollock on Torts, 36, 37; Shear. and Redf. on Neg., 10. There must be, before a recovery can be had in actions for negligence, a breach of duty on the part of the defendant, and the act or omission, producing the breach of duty, culpable in itself, must be such as a reasonably careful man would foresee might be productive of injury; and one is not liable for an injury which he could not foresee. Smith on Neg., 24; *Blythe v. Water Co.,* 11 Exc., 781." And in *Drum v. Miller,* 135 N. C., 204, 208: "There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful or is at least a wilful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but when the act is lawful, the liability depends, not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. In the one case he is presumed to intend the consequence of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner; otherwise it becomes unlawful, if a prudent man in the exercise of proper care can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen." Also in *Bradley v. Coal Co.,* 169 N. C., 255: "Before there could be a recovery on the part of the plaintiff it was necessary for him to show a breach of duty on the part of the defendant . . . some act or omission producing the breach culpable in itself and such as a reasonably careful man would foresee might be productive of injury; for one is not liable for an injury which he could not foresee." Of like tenor are *Winborne v. Cooperage Co.,* 178 N. C., 88; *Jefferson v. Raleigh,* 194 N. C., 479; and *Street v. Coal Co.,* 196 N. C., 178.

But the foresight of harm as an element of actionable negligence must not be confused with foresight as an element or test of proximate cause.

The idea that a wrongdoer is liable in damages for all the consequences which flow from his wrongful act is sometimes expressed by saying that the consequences for which he is liable are those which he ought reasonably to have foreseen; but anticipation of harm as an element of negligence is distinct from the anticipation of consequences as an element of proximate cause. The latter phase is set forth in *Brewster v. Elizabeth City,* 137 N. C., 392; *Wright v. Thompson,* 171 N. C., 88; *Whitt v. Rand,* 187 N. C., 805, 808, and other cases. See 45 C. J., 656, 657, 913, 917.

The container was a small tin or copper box, the lid of which, according to plaintiff's testimony, would come off easily, because the corners were loose and not fastened together. He said that to the best of his knowledge the lid was sprung and that he pushed it back when he took the box from his pocket: "I reached my hand in my pocket and then noticed that the lid was slipped up or had come off, but it went back on and I set it up; seeing and knowing that, I didn't put my hand in my pocket to see if any of the caps had come out. I never thought about it." When he retired at night he laid his pants by the side of the bed, and the next day he wore them.

It is important to note the plaintiff did not say that any of the caps came out of the box and remained in his pocket; this is a matter of conjecture. He did not say that any of the caps exploded in his pocket. His words were, "I jumped down to get it (his whip), and when I hit the ground it fired. I don't know what it was that fired."

The plaintiff's evidence considered as a whole does not disclose conditions from which we can conclude as a matter of law that the defendant should reasonably have foreseen that dynamite caps would escape from the box and be carried in the plaintiff's pocket for nearly twenty-four hours and then, when subjected to a jar, explode and inflict the alleged injury, or, indeed, that any other injury would result. In the box there was manifestly no defect that was not as apparent to the plaintiff as to the defendant—in any event nothing more than an ill-fitting lid; and if the plaintiff, after seeing the lid was loose, did not suspect that caps might have been left in his pocket, it is not reasonable to say that the defendant should be held to liability for failing in the exercise of due care to foresee such an unusual and unaccustomed contingency.

The motion for nonsuit should have been granted. Judgment Reversed.

NORTH CAROLINA INDUSTRIAL COMMISSION ET AL. v. NATHAN O'BERRY, STATE TREASURER.

(Filed 23 October, 1929.)

1. **Master and Servant B a—North Carolina Industrial Commission must operate under budgetary policy of the State.**

   The North Carolina Industrial Commission created by the statute is an agency of the State and subject to the fixed policy of the State requiring each department of the State government to operate within the appropriations allowed to it by the Budget Bureau under the statute creating it.

2. **Same—Funds collected from self-insurers are available to Industrial Commission under allocation of Budget Bureau.**

   The moneys received under section 73 (j) of the Workmen's Compensation Act is a special fund available to the Industrial Commission for its maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed *in pari materia*, and *Held*, the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said section 73 (j) as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and amount necessary to the Industrial Commission for this purpose.

THIS was a controversy without action, heard by *Nunn, J.*, at July Term, 1929, of WAKE.

The agreed statement of facts, upon which the judgment was rendered, tended to show in substance that the plaintiff was duly created under authority of chapter 120, Public Laws of 1929, and that the defendant is the Treasurer of the State. Chapter 280 of Public Laws of 1929, Division 4, Section 1, Item 17, appropriated for the use of the plaintiff the sum of $42,000 for each year of the biennium. Section 67 of chapter 120, Public Laws of 1929, permits certain employers to become self-insurers. Section 73 (j) provides that "the Commission shall assess against such payroll a maintenance fund tax computed by taking 2½ per cent of the basic premiums chargeable against the same or most similar industry or business taken from the manual insurance rate for compensation then in force in this State." On 26 June, 1929, the Commission received from the city of Greensboro a check in the amount of $214.15, representing the amount assessed against said city of Greensboro as a self-insurer by the Industrial Commission under the provisions of said subsection (j) of said section 73. Upon receipt of said check the Commission deposited the check in a Raleigh Bank as a special deposit for the use of the Commission. The defendant, State Treasurer, declined to accept the deposit "as a special deposit for the use of the Commission, but on the contrary, under the advice of the Attorney-

General, said Treasurer insists and demands that the said fund be deposited to the credit of the State Treasurer for the use of the State."

The facts further tended to show that the appropriation of $42,000 for the use of the Commission was wholly inadequate to enable the Commission to properly and efficiently discharge the duties imposed by law, and that in order to discharge such duties the sum of $159,298.54 would be required for the first year of the biennium and a somewhat smaller sum for the second year.

The plaintiff thereupon brought this action, asking that a writ of mandamus should issue, ordering the State Treasurer to place said fund and such other funds of like character in a special account "to be used for the maintenance of the North Carolina Industrial Commission."

The judgment of the court was as follows:

"This controversy without action coming on to be heard before Hon. R. A. Nunn, judge presiding at the July Term, 1929, of the Superior Court of Wake County, and being heard at said time by consent of all parties hereto, upon the facts agreed; and the court, after due consideration, finding the facts to be as set forth in the agreed statement of facts, and being of the opinion that all funds that shall be assessed and collected by the North Carolina Industrial Commission under the provisions of section 73, subsection (j) of the Workmen's Compensation Act (chapter 120, N. C. Public Laws of 1929), including the check of the city of Greensboro already collected by the Commission under the provisions of said section, as set forth in the agreed statement of facts, are by the provisions of said act, intended to be available as a special fund for the uses of said Industrial Commission to meet its maintenance and expense requirements, and as such, should be deposited as collected by the Commission, to the credit of the Treasurer as a special fund for such purpose, and so accepted by the said Treasurer and carried on his books accordingly, to be paid out upon proper warrants issued by the Auditor of the State upon requisition of the said Industrial Commission for the payment of the proper expenses of said Commission; it is, upon motion of J. M. Broughton, attorney for the plaintiffs:

Now, therefore, ordered, considered and adjudged by the court that the defendant, Treasurer of the State of North Carolina, be, and he is hereby authorized and directed to accept as a special fund for the uses of the said Industrial Commission, to meet its maintenance and expense requirements, the specific deposit of $214.15, referred to in the agreed statement of facts, together with all other funds which shall be collected by the Industrial Commission under the provisions of said section 73, subsection (j) of the said Workmen's Compensation Act, as the same shall be collected and deposited from time to time by the said Industrial

Commission, and that said funds when so deposited shall be set up on the books of the Treasurer of the State as a special account, available for the payment of proper expenses of said Commission upon warrants issued for such purpose by the State Auditor, upon proper requisition of the Industrial Commission, in the manner provided by law."

J. M. Broughton for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Nash for defendant.

BROGDEN, J. Do the words "the Commission shall assess against such payroll a maintenance fund tax computed," etc., contained in section 73, subsection (j) of the Workmen's Compensation Act constitute the proceeds of such assessment a special fund for the exclusive use of the Industrial Commission?

The Industrial Commission is an agency of the State, established by chapter 120, Public Laws of 1929.

The General Assembly having created this important arm of service, undertook to provide for the maintenance and support thereof. It now appears that the general appropriation is wholly inadequate to enable the Commission to discharge with efficiency the extensive duties required by the law, thus resulting in a serious impairment of the quality of service to be rendered the people of the State. Chapter 280, Public Laws of 1929, Division 4, Item 17, appropriated for the maintenance of the Commission the sum of $42,000 for each year of the biennium.

The plaintiff contends that if it is permitted to use the proceeds of the assessments against self-insurers that such assessments will create for its use a sum not only sufficient, but perhaps in excess of its reasonable needs. The Commission further contends that the General Assembly, realizing that the general appropriation might be inadequate, used the words "maintenance fund tax" in section 73, subsection (j) in the sense of an additional appropriation for its use.

It is manifest, therefore, that the case turns upon the construction of the words "a maintenance fund tax" employed in said section 73 (j). It must be noted that this section does not empower the Commission to collect the money, but merely to levy the assessment. It must be further noted that if the funds derived from the assessment should exceed the amount reasonably necessary for the use of the Commission that no provision is made for the disposition of any balance.

It must be conceded that the language is indefinite and capable of more than one construction. In order, therefore, to arrive at the true construction, it is manifest that the words employed by the General

Assembly must be read and interpreted in the light of the general policy of the State with reference to the maintenance of State agencies. An examination of legislative acts pertinent thereto clearly disclose the outstanding fact that the budget system is a fixed policy of the State. This idea is fully supported by the provisions of the Consolidated Budget Act, which is chapter 100, Public Laws of 1929. Section 5 of said act provides that "all moneys heretofore and hereafter appropriated shall be deemed and held to be within the terms of this act and subject to its provisions unless it shall be otherwise provided in the act apppropriating the same; and no money shall be disbursed from the State Treasury except as herein provided." Again in section 17 thereof it is declared: "The provisions of this act shall continue to be the legislative policy with reference to the making of appropriations and shall be treated as rules of both branches of the General Assembly until and unless the same may be changed by the General Assembly either by express enactment or by rule adopted by either branch of the General Assembly." The same idea is further expressed in section 18 of said act, providing that "every State department, . . . Commission . . . shall operate under an appropriation made in accordance with the provisions of this act; and no State department, . . . Commission or other State agency, . . . shall expend any money, except in pursuance of such appropriation, and the rules, requirements and regulations made pursuant to this act."

These provisions of law demonstrate beyond a doubt that the Industrial Commission must operate within the provisions and limitations of the budgetary policy of the State as declared by the General Assembly.

However, sections 28 and 29 of the Budget Act refer to departments or agencies "as receive moneys available for expenditures by them." Section 29 provides: "It is the intent and purpose of this act that every department . . . Commission . . . that expends money appropriated by the General Assembly or money collected by or for such department, . . . Commission, or agencies . . . under any general law of this State, shall be subject to and under the control of every provision of this act," etc.

Conceding, by broad interpretation, that the words "maintenance fund tax" occurring in section 73 (j) of the Workmen's Compensation Act created a fund available for the use of the Commission, the provisions of sections 28 and 29 of chapter 100 of Public Laws of 1929 limit or restrict the availability of such funds by providing that the expenditure thereof "shall be subject to and under the control of every provision of this act." In other words, if a State agency collects or receives funds available for its use, who must determine the amount to be used by any such agency in the absence of express or necessarily implied legislative designation? If the agency receiving the funds can use them according to its own discretion or according to its own idea of its needs or necessities, then clearly, large sums of the State's money would be unbudgeted, and the whole scheme of law which is built upon a sound fiscal policy, would become a medley of financial confusion and a patchwork of financial control.

Viewing the law in its entirety, we are of the opinion, and so adjudge, that the proceeds derived from self-insurers under the Compensation Act are available for the use of the Industrial Commission, and that under the law the Budget Bureau has the power and authority to allocate to the Commission the whole of such proceeds or such amounts thereof as in the judgment of the Budget Bureau may be reasonably necessary for the proper and efficient maintenance of the Commission.

The record in the case at bar discloses that the Commission will be greatly handicapped unless additional funds can be allocated. The Budget Bureau has the power, under the law, to meet this emergency by permitting the Commission to use the fund in controversy and other funds of similar nature to the extent and to the amount necessary to enable it to serve in an efficient manner the people of this State.

Reversed.

LUCIAN GUSTAVEUS BRIDGEMAN v. THE PILOT LIFE INSURANCE COMPANY.

(Filed 23 October, 1929.)

1. **Insurance I b—Defense of false representations affecting validity of policy cannot be maintained under facts of this case.**

   Where in an application for a policy of accident insurance the plaintiff answered no to the question as to impairment of sight, and the jury has found that he had answered truthfully under the evidence tending to show that he had at one time an injury to his eye, but that it was cured at the time of the application: *Held*, the defense that the answer was incorrect and was a false representation affecting the validity of the policy, cannot be maintained.

2. **Pleadings A c—Trial court has power to allow amendment to pleadings which do not substantially change cause of action.**

   The judge of the Superior Court has plenary power to permit amendments to the pleadings when the amendment does not substantially change the cause of action originally alleged or set up a new cause of action. C. S., 547, 549.

3. Appeal and Error J e—Error, if any, in admission of certain testimony was cured by admissions to same effect.

Where questions eliciting evidence objected to are covered by admissions of the objecting party, the admission of such evidence, if erroneous, is harmless and not prejudicial.

APPEAL by defendant from *Cranmer, J.*, and a jury, at May Term, 1929, of ROBESON. No error.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the plaintiff represent, in his application for the accident policy now sued on, that he had no impairment of sight? Answer: Yes.

2. Was said representation true? Answer: Yes.

3. What sum, if any, is plaintiff entitled to recover? Answer: $833. The first issue was answered by consent, and the third issue was answered by consent following the verdict of the jury on the second issue."

Britt & Britt for plaintiff.
Varser, Lawrence, Proctor & McIntyre for defendant.

PER CURIAM. The plaintiff brought this action against the defendant on an accident policy, taken out in defendant's company on 17 August, 1928, and in force at the time of the accident. The conditions of the policy were complied with and proof of the accident furnished the defendant. Among the various injuries which the policy provides for is payment for the accidental loss of an eye. The only question around which the controversy waged was the second issue: "Was said representation true?" The jury answered this issue in favor of the plaintiff. The defendant set up fraud to vitiate the policy. In the application that plaintiff made for the policy, was the following: *"Have you any* deformities, amputations, *impairment of sight* or hearing *or have you ever had* fits, epilepsy, attacks of unconsciousness, or any nervous trouble?" To this question the plaintiff answered "No." The contention of the defendant was that this was false—the "question was incorrectly, falsely and fraudulently answered" and that "said condition materially affected the insurability of plaintiff." That the plaintiff had theretofore suffered a serious injury to his right eye and it was practically destroyed, and the accident was to the same eye for which this action was brought. Plaintiff contended that in an automobile accident on 14 October, 1928, this right eye was so seriously injured that he had to have it removed from the socket and has lost the sight of this eye. In reply to the allegation of fraud, the plaintiff, after setting up other defenses not material on this record to be considered, denied "that the questions as answered were false and fraudulent, and especially denied that he made any incorrect statements or answers to the questions." It may be noted that the language of the policy was, "Have you any . . . . impairment of sight," not "have you ever had."

Without objection plaintiff testified "The complete ball of the eye was removed from the socket. This eye was *absolutely all right* prior to the time that I had the accident the 14th of September (October). I could see out of the eye and read anything I wanted to. I do not wear glasses." Plaintiff testified that this eye was previously injured, on 19 July, 1927, by an ale bottle "Nehi" bursting and the top striking him in the eye "cutting a little skin on the lid just below the eye lash and striking the ball of the eye." The plaintiff further testified, without objection, that he employed a physician to treat it. "I finally got *absolutely well* from the treatment. That was in 1927. I never have worn a pair of glasses. . . . At that time I was tested as to whether I could see out of that eye by Mr. Badger (referring to Badger McLeod, agent, who wrote the insurance for defendant company). He closed this eye (indicating good eye) and pointed out calendars and pencils and other things he had in the office to examine my eye with, and I was able to read out of that eye absolutely; there was no impairment that I know of."

We do not think that under our liberal practice that there was such a departure in the pleadings and evidence that there was any error in this respect in the trial in the court below. The court below had plenary power to amend the pleadings in so far as it did not change the cause of action and allege substantially a new cause of action without consent. C. S., 547, 549. *Lefler v. Lane,* 170 N. C., 181; *Goins v. Sargent,* 196 N. C., at p. 481. Taking into consideration the evidence unobjected to and that which was objected to bearing on the same subject, if any error was committed, it was not prejudicial. The evidence taken as a whole, we think, complied with C. S., 564.

From a careful perusal of the case, it appears to us that it was mainly a question of fact. That fact was decided by the jury in favor of plaintiff. On the whole record, we find no prejudicial or reversible error.

No error.

STATE v. J. W. POE.

(Filed 23 October, 1929.)

False Pretense A b—False representations must be relied on to constitute crime of false pretense.

In order to constitute the crime of false pretense it is required that the representations alleged to be false were relied upon, and under the evidence in this case it is held the action should have been dismissed.

APPEAL by defendant from *Devin, J.,* at June Term, 1929, of ORANGE. Reversed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. C. Ray for defendant.

PER CURIAM. The defendant was indicted for false pretense, the charge being that he had falsely pretended to Ernest Mann that T. N. Mann had said for Ernest Mann, his son, to accept the defendant's check in payment of a large quantity of lumber. T. N. Mann testified he had not made this statement. There was evidence for the State that when the defendant came to the place of business to get flooring, Ernest Mann went to see his father, who told him that the defendant would have to pay the cash or its equivalent for the lumber, and that upon his return he gave this information to the defendant, who then said that he had arranged with T. N. Mann to give him a note payable in thirty or sixty days. Ernest Mann testified: "I let him have the lumber upon his representations that the check would be paid when due, and but for these representations and the statement made to me that he had arranged with my father to take a note or check I would not have let him have it. I helped to load the lumber after I returned from seeing my father about it, and after Mr. Poe stated he had arranged with my father to take a check or note, payable in thirty or sixty days. I am sure that I saw my father last, and that Mr. Poe did not see him after I did."

One of the elements of a criminal prosecution for false pretense is reasonable reliance on the representation by the party to whom it is made. Ernest Mann was told by his father immediately before the alleged representation was made that credit should not be extended to the defendant, and if he saw fit to disregard this positive instruction it cannot be held for law that he reasonably relied upon the defendant's statement. He must have known that if his father had previously made this agreement with the defendant it was not effective in the face of the instruction to accept from the defendant nothing but the cash or its equivalent.

The action should have been dismissed. *S. v. Mayer,* 196 N. C., 454.

Reversed.

L. N. SASSER v. TOLAR-HART HOLT MILLS, INC.

(Filed 23 October, 1929.)

Master and Servant C a—Employee must establish negligence of employer as proximate cause of injury.

Where an employee at a cotton mill chooses of his own volition to run his hand into a revolving screen to clean it of a piece of cotton, knowing that it would be injured, except for his quickness in withdrawing it, and that the machinery should have been first stopped: *Held*, there is no presumption of negligence on the part of the defendant from the fact of injury, and the plaintiff must establish negligence of the defendant as the proximate cause of his injury, and in this case the action was properly dismissed.

APPEAL by plaintiff from *Crammer, J.*, at February Term, 1929, of CUMBERLAND. Affirmed.

Nimocks & Nimocks and Robinson, Downing & Downing for plaintiff.
Oates & Herring for defendant.

PER CURIAM. This is an action for the recovery of damages for personal injury. The plaintiff undertook to clean a lapping machine while the machinery was in motion, in consequence of which his left hand was caught in a revolving screen and severely injured. His action was dismissed as in case of nonsuit and he appealed.

It was incumbent upon the plaintiff to establish the defendant's negligence as the proximate cause of his injury. The mere fact of his injury does not raise a presumption of negligence, and there is no evidence that the defendant required the plaintiff to remove the trash or waste cotton while the machinery was moving. The plaintiff seems to have acted upon his own initiative. He testified: "I saw this piece of cotton in the screen. I seen the bulk of it. I knew that there were revolving spokes in there at that place. I knew that unless I stopped the machine that the screen with its spokes was turning. I knew that if I put my hand in between the spokes and left it there long enough that one of those spokes was bound to cut my hand, but I didn't intend to let it stay. It cut me anyway."

An examination of the record discloses no reversible error either in the rejection of evidence or in the judgment dismissing the action.

Affirmed.

W. C. CLARK v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 30 October, 1929.)

Taxation A d—Classification of trucks, etc., for taxation in accordance with distance between termini is constitutional and valid.

The statute classifying trucks, etc., hauling freight for hire for license taxes in accordance with the distance of route along the State's highway is held to be upon a reasonable and substantial basis, and there being no constitutional inhibition against such classification, it is held not to be discriminatory contrary to the provisions of our State Constitution, Art. V, sec. 3, or section 1, Fourteenth Amendment to the Constitution of the United States.

APPEAL by defendant from *Harris, J.*, at April Term, 1929, of WAKE. Reversed.

Action to recover a sum of money paid by plaintiff, under protest, to defendant, as a license tax, for the privilege of engaging in the business of operating a motor-propelled truck for the transportation of property over the public highways of this State, for compensation.

Payment of said license tax was demanded by defendant, as Commissioner of Revenue of this State, under the provisions of subsection 3, section 165, chapter 345, Public Laws of North Carolina, 1929. This chapter is entitled "An act to raise revenue." Section 165 of said act is included under Schedule B, which is entitled "License Taxes." Subsection 3 of said section is in words as follows:

"Every person, firm or corporation, their lessees, trustees or receivers, engaged in the business of operating automobiles, or other motor vehicles, trucks, tractors, trailers or semi-trailers, for the transportation of property over the public highways of this State for compensation between termini for a distance of greater than fifty (50) miles, either upon call, prearrangement, contract, lease or other arrangement, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license an annual tax as follows:

For each such motor-propelled vehicle, truck, trailer or semi-trailer of a rated carrying capacity of less than three tons, at the rate of forty-five dollars ($45) per ton.

For such motor-propelled vehicle, truck, tractor, trailer or semi-trailer of a rated carrying capacity of three tons or over at the rate of seventy-five dollars ($75) per ton."

Plaintiff is a citizen of this State, and the owner of a one-ton, motor-propelled truck. He is engaged in the business of operating said truck for the transportation of property over the public highways of this

State, for compensation. He operates said truck sometimes between termini which are less, and sometimes between termini which are more than fifty (50) miles distant from each other, dependent upon the special contract or arrangement made by him with each customer.

He was engaged in such business on 1 June, 1929, and since said date he has continued, and now proposes to continue in such business. Upon defendant's demand, plaintiff has paid to defendant the sum of forty-five dollars ($45), for which sum a State license has been issued to him, in accordance with the provisions of subsection 3, section 165, chapter 345, Public Laws of North Carolina, 1929.

Plaintiff conceded that he was liable, under subsection 2, section 165, chapter 345, Public Laws of North Carolina, 1929, for a license tax of fifteen dollars. He contended that he is not liable for a license tax, under subsection 3, section 165, chapter 345, Public Laws of North Carolina, 1929, for the reason that said statute is unconstitutional and void. Plaintiff paid to defendant the sum of thirty dollars, under protest.

This action to recover the sum of thirty dollars was begun in the court of a justice of the peace of Wake County, and was heard in the Superior Court of said county, upon plaintiff's appeal from the judgment of said court.

From the judgment in accordance with the opinion of the court that the statute, under which the license tax was demanded by defendant and paid by the plaintiff, is unconstitutional and void, defendant appealed to the Supreme Court.

Albion Dunn for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Nash for defendant.

CONNOR, J. The only question presented for decision by this appeal is whether the statute under which plaintiff has been required to pay a license tax for the privilege of engaging in the business of operating a motor-propelled truck for the transportation of property over the public highways of this State, for compensation, is in violation of section 3 of Article V of the Constitution of North Carolina, or of section 1 of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff contends that the license tax which he has been required to pay under the provisions of the statute is not uniform, in that the said license tax exceeds the amount of the tax imposed by other statutes upon persons engaged in the same business, and that, therefore, the statute is in violation of section 3 of Article V of the Constitution of North Carolina.

Plaintiff further contends that the enforcement of the said statute deprives him of his property without due process of law, and of the equal protection of the law, in that he is required by its provisions to pay a larger sum of money as a license tax than is required of others engaged in the same business, and similarly situated, and that, therefore, the statute is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States.

In reply to the contrary contentions of defendant, plaintiff alleges that the classification made by the statute for the purpose of taxation, is unreasonable and arbitrary in that there is no just or reasonable ground for the classification. If these contentions of the plaintiff are well founded, the judgment should be affirmed; otherwise it must be reversed.

Upon full consideration of these contentions, and of the principles of law, established by authoritative decisions of this Court and of the Supreme Court of the United States, we are of opinion that they are not well founded, and that the judgment must be reversed.

There is no express provision in the Constitution of North Carolina that taxes levied by the General Assembly of this State, on trades, professions, franchises or incomes, as authorized by section 3 of Article V of said Constitution, shall be uniform. The rule of uniformity, as therein prescribed, is applicable only to taxes on property, real or personal, including moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise. It is well settled, however, that a tax imposed or authorized by the General Assembly on trades, professions, franchises or incomes, not uniform, as properly understood, cannot be sustained for the reason that such tax is inconsistent with natural justice. *S. v. Williams,* 158 N. C., 610, 73 S. E., 1000. The rule of uniformity, as applied to such taxes, does not deprive the General Assembly of the power to classify the subjects of taxation, for the purpose of prescribing a different rule of taxation for each class, and of imposing upon such subjects falling within the several classes a different rate of taxation. The only limitation upon this power is that the classification must be founded upon reasonable, and not arbitrary, distinctions. The rule is authoritatively stated by *Hoke, J.,* in *Land Company v. Smith,* 151 N. C., 70, 65 S. E., 641, as follows:

"The power of the Legislature in this matter of classification is very broad and comprehensive, subject only to the limitation that it must appear to have been made upon some 'reasonable ground—something that bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.'"

Upon this principle, the classification made by the General Assembly of this State for purposes of taxation of persons, firms or corporations engaged in the business of operating motor-propelled vehicles, for the transportation of property on the public highways of the State, for compensation, must be sustained. All persons, firms or corporations engaged in such business are required to pay a license tax. None are exempt. The amount of the tax is determined by the class in which each person, firm or corporation is included. The distinction between those who transport property over the public highways of the State, for compensation, between termini which are less than fifty (50) miles distant from each other (subsection 2, section 165, chapter 343, Public Laws 1929), and those who transport property over said highways also for compensation sometimes between termini which are less, and sometimes between termini which are more than fifty (50) miles distant from each other, dependent upon the contract with each customer (subsection 3, section 165, chapter 345, Public Laws 1929) is, we think, reasonable and not arbitrary. The privilege of engaging in the latter business is more valuable than the privilege of engaging in the former business, only. The service furnished by the State to the former is less expensive than the service furnished to the latter. It cannot be said that it is unjust for the State to require a larger license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the State. We cannot hold as a matter of law that the classification made in this instance by the General Assembly is void, for that the line separating the two classes is arbitrary. As said by *Justice Holmes,* in his opinion in *Louisville Gas & E. Co. v. Coleman,* 277 U. S., 32, 72 L. Ed., p. 775: "When a legal distinction is determined, as no one doubts it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself, without regard to the necessity behind it, the line or point seems arbitrary. It might as well, or nearly as well, be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted, unless we can say that it is very wide of a reasonable mark."

It has been held in numerous cases by the Supreme Court of the United States, whose decisions are authoritative with us upon the question as to whether the statute involved in the instant case is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, that the provisions of said section do not forbid classification by the State of subjects of taxation, and that the power of the State to classify for purposes of taxation is of wide range and flexibility, subject only to the limitation that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Louisville Gas & E. Co. v. Coleman,* 277 U. S., 32, 72 L. Ed., 770, and cases cited. In *Brown-Forman Co. v. Kentucky,* 217 U. S., 563, 54 L. Ed., 883, it is said: "A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

Upon these principles, it must be held that the statute involved in this action is not in violation of the provisions of section 1 of the Fourteenth Amendment of the Constitution of the United States.

The General Assembly of this State, for purposes of taxation, has classified all persons, firms or corporations engaged in the business for which a State license is required by statute. The distinction made between the several classes, in accordance with said classification, rests upon reasonable grounds, having a substantial relation to the objects of the legislation. Having made a valid classification, the General Assembly had the power, which it has exercised in its legislative discretion, to prescribe different methods of determining the amount of the license tax imposed upon the subjects of the taxation, falling within the several classes, and to impose a license tax of varying amount upon such subjects of taxation. There is no provision of the Constitution either of this State or of the United States, which forbids the General Assembly to exercise this power. The statute is valid; upon the agreed statement of facts, plaintiff was liable for the license tax paid by him upon the demand of the defendant. He is therefore not entitled to recover in this action.

The distinction between the statute involved in this case, and the statute which we held void in *Tea Co. v. Doughton,* 196 N. C., 145, 144 S. E., 701, is, we think, obvious. The classification made, as contended by the defendant in that case, was not founded upon any reasonable or substantial ground. That statute also unjustly discriminated between the plaintiffs, who owned and operated six or more stores, all of which were taxed, and other merchants, who owned and operated five or less stores, all of which were exempt from the tax imposed by the statute upon plaintiffs. In this case the classification, for purposes of taxation, is reasonable, and there is no exemption. There is, therefore no unjust discrimination. The judgment in this case is

Reversed.

CLEMENT RICHARDSON v. CULLEN SATTERWHITE.

(Filed 30 October, 1929.)

Estoppel B a—Where issues are raised by the pleadings a judgment without a trial will not estop subsequent action.

A judgment rendered as a matter of law upon pleadings which raise issues of fact determinable only by a jury, is not an estoppel between the parties and those claiming under them in a subsequent action involving the same subject-matter.

CIVIL ACTION, before *Grady, J.*, at February Term, 1929, of FRANKLIN.

The evidence tended to show that Cullen Satterwhite owned a tract of land in Franklin County, and that he had traded through a period of sixteen years with N. B. Finch, trading as N. B. Finch & Co., purchasing fertilizer and supplies, and that on 5 March, 1924, Finch represented to Satterwhite that he was indebted to him on said account in the sum of $4,811.73, and procured the execution of a mortgage upon Satterwhite's land to secure the indebtedness. Thereafter, on 2 November, 1926, Finch, mortgagee, advertised the land for sale in accordance with the terms of said mortgage. Thereupon, on 3 December, 1926, Satterwhite instituted an action in the Superior Court of Franklin County, entitled, "Cullen Satterwhite *v.* N. B. Finch, trading as N. B. Finch & Co.," alleging that there was a mistake in the account for that, although Satterwhite had executed said mortgage to secure the sum of $4,811.73, as a matter of fact the said Satterwhite, upon a proper accounting, owed Finch nothing, and that by reason of said mistake Finch was indebted to said Satterwhite in the sum of $2,000. Satterwhite in the complaint asked for an injunction to restrain a sale of his land "until there shall have been an accounting between the plaintiff and the defendant." The cause came on for hearing at the August Term, 1927, Franklin Superior Court, when Judge Lyon rendered the following judgment:

"And it appearing to the court and being found by the court from the pleadings, that there has been account stated between the parties on 5 March, 1924, at which time there was due the defendant by plaintiff the sum of $4,011.73, with interest on said sum from 1 January, 1924, at the rate of 6% per annum;

And it further appearing to the court, and being found by the court from the pleadings, that the plaintiff alleges no fraud or specific errors in said account, and that all material facts and allegations of the complaint being fully denied by the defendant in his answer, and the court being of the opinion, and so finding from the pleadings, that the plaintiff is not entitled to the relief demanded in his petition and complaint:

It is, therefore, by the court ordered, considered and adjudged, that the petition and complaint of the defendant be and the same is hereby denied, and the temporary restraining order hereinbefore entered is dissolved, and it is further ordered, adjudged and decreed that unless the plaintiff shall, within ninety days from the expiration of this term of Franklin Superior Court, pay off and discharge the mortgage and lien bond described in the pleadings, together with interest thereon, that the defendant is authorized, empowered and directed to proceed with the foreclosure of the said lien bond and mortgage in accordance with the terms thereof and by law provided.

It is further ordered, adjudged and decreed that the plaintiff pay the costs of this action to be taxed by the clerk."

Satterwhite neither excepted to nor appealed from said judgment.

Thereafter, on 20 February, 1928, N. B. Finch, mortgagee, sold said land, and the same was purchased by F. D. Finch. On 27 April, 1928, Finch and wife conveyed the land to Clement Richardson.

On 24 November, 1928, Clement Richardson brought the present suit against Cullen Satterwhite, alleging that Satterwhite was in the unlawful possession of said land. The defendant, Satterwhite, filed an answer alleging that at the time of the sale by Finch, mortgagee, on 20 February, 1928, "there was nothing whatever due to the said N. B. Finch from the mortgage which he pretended to foreclose, and the said sale was unlawful, null and void for said reason," etc. In the meantime, on or about 27 April, 1928, the plaintiff, Clement Richardson, had borrowed from the Citizens Bank of Spring Hope, N. C., the sum of $3,500, and in order to secure the same had executed and delivered to O. B. Moss, trustee, a deed of trust upon said tract of land. Satterwhite, however, alleged that the bank had full notice and knowledge of all the facts set forth in the answer of Cullen Satterwhite and held the land "subject to all the rights and equities of this defendant." The case came to trial at the February Term, 1929, Franklin Superior Court. At the conclusion of the evidence the following judgment was entered:

"This cause coming on to be heard before his Honor, Henry A. Grady, judge presiding, and a jury, after the evidence had been offered by the plaintiff and defendant, the court was of the opinion and held as a matter of law that the defendant was estopped by the judgment rendered at August Term, 1927, entitled Cullen Satterwhite *v.* N. B. Finch, trading as N. B. Finch & Co., wherein it was found as a fact, by Hon. C. C. Lyon, presiding judge, that there had been an accounting between the parties to said action on 5 March, 1924, the present plaintiff being the successors in title to the lands referred to in said former judgment by mesne conveyances from N. B. Finch, mortgagee of Cullen Satterwhite; and the court holds as a matter of law that the defendant is estopped by said judgment from setting up the equities referred to in his answer in respect to the alleged invalidity of said mortgage deed; and the following issues having been submitted to the jury and answered by them, to wit (see issues and verdict above):

Now, upon the verdict and the evidence offered, and the ruling of the court in respect to the estoppel pleaded by the plaintiff, it is considered, ordered and adjudged that the plaintiff, Clement Richardson, is the owner in fee simple, subject to the mortgage deed to his co-plaintiff referred to in the pleadings of the Citizens Bank of Spring Hope, N. C., of all the lands and premises referred to and described in the complaint, being that certain tract or parcel of land situate in Franklin County, Dunn Township, and described by metes and bounds in that certain mortgage deed, dated 5 March, 1924, and recorded in Book 257, at page 237, of the register's office of Franklin County, which book and page shall operate as a part of this judgment, and the description therein contained shall be deemed to be a part hereof to all intents and purposes.

It is further ordered and adjudged that a writ of assistance be issued by the clerk of the Superior Court, directing the sheriff of Franklin County to put the defendant out of the possession of said lands, and to put the plaintiff Richardson into possession thereof.

It is further ordered that the question of rents and profits issuing out of said lands, and demanded in the complaint, be continued to be passed upon by a jury at some subsequent term of this court."

From the foregoing judgment the defendant appealed.

White & Malone for plaintiff.
Yarborough & Yarborough for defendant.

BROGDEN, J. Did the judgment of Lyon, J., rendered at the August Term, 1927, of Franklin Superior Court, constitute an estoppel upon the defendant in this action?

An examination of the Lyon judgment, set out in the record, discloses that the judge found from the pleadings that the plaintiff in the action was indebted to N. B. Finch in the sum of $4,011,73. The judge further found from the pleadings that "all material facts and allegations of the complaint, being fully denied by the defendant in his answer, and the court being of the opinion, and so finding from the pleadings that the plaintiff is not entitled to the relief demanded in his petition and complaint, it is, therefore, by the court ordered, considered and adjudged that the petition and complaint of the plaintiff be, and the same is hereby denied."

It will be observed that the complaint alleged that the plaintiff was a colored man with practically no education, and entirely unable to keep books or accounts, and that he relied upon the correctness of the account as kept by the defendant. Plaintiff further alleged that a mistake had been made in the account, and that although he had given a note to the defendant and secured the same by a mortgage upon his land, that by reason of the mistake he was not indebted to the defendant at all.

Clearly, the complaint alleged a cause of action. The allegations of the complaint were denied in the answer. The pleadings, therefore, raised an issue of fact for the jury. The trial judge ordered "that the petition and complaint of the plaintiff be, and the same is hereby denied." While this language is of doubtful import, apparently the judgment, denying the complaint, would be equivalent to a dismissal of the action. As the pleadings raised issues of fact and the jury trial was not waived, the judge was without power to declare, upon the pleadings alone, "that there has been an account stated between the parties." The principle of law applicable is stated in *Grimes v. Andrews,* 170 N. C., 515, 87 S. E., 341: "And when it appears from the record that the court never determined the merits of the controversy nor rendered any judgment affecting the same, but simply dismissed the plaintiff's action, without trial and without evidence, such judgment does not support a plea of former adjudication. . . . We do not say that where it appears that the merits have been considered and passed upon, the judgment of dismissal may not be successfully pleaded as a former adjudication," etc.

The Lyon judgment decreed that if the plaintiff should not pay the indebtedness within ninety days that the defendant was authorized and directed to proceed with foreclosure of said lien bond and mortgage in accordance with the terms thereof, but having dismissed plaintiff's action, and there being no allegation in the action or prayer for foreclosure, this portion of the judgment was not supported by the pleadings. This principle of law was expressly declared in *Hoell v. White,* 169 N. C., 640, 86 S. E., 569.

In view of the facts disclosed by the record, we are of the opinion that the judgment rendered by Lyon, J., at the August Term, 1927, was not an estoppel upon Cullen Satterwhite, and, therefore, the judgment of Grady, J., at the February Term, 1929, is

Reversed.

IN THE MATTER OF CAROLINA BANK AND TRUST COMPANY, AN INSOLVENT BANKING CORPORATION.

(Filed 30 October, 1929.)

1. **Banks and Banking H a—Request that cashier sell stock does not relieve holder of statutory liability when stock has not been sold.**

Where the name of a person remains on the books of a bank as a stockholder on the date of the bank's insolvency, and so appears when the insolvent bank is in the hands of a liquidating agent appointed by the Corporation Commission, C. S., 219(a), Vol. 3, his statutory liability to the amount of the par value of his shares subscribed is not affected by the fact that he had prior requested the cashier of the bank to sell his shares when the cashier had not been able to do so, and the sale had not been made and the shares had not been transferred on the books of the bank to another. *Darden v. Coward, ante,* 35, cited and distinguished.

2. **Same—Defense that bank stock was bought prior to enactment of Ch. 113, Public Laws 1927, is untenable in action for statutory liability thereon.**

The statutory liability of the holder of bank stock for the amount equal to the par value of his shares is contractual and exists from the time of the purchase of the stock, and chapter 113, Public Laws of 1927, does not alter nor enlarge this liability, but has reference only to the pocedure to enforce it, and the defense that the stock was bought prior to the enactment of the statute of 1927, and that the statute could have no retroactive effect, is untenable.

3. **Same—Only depositor's dividends may be credited to his statutory liability on stock in insolvent bank.**

Where the holder of stock of an insolvent bank is also a depositor therein, only such dividends as he receives on his deposit may be credited by the liquidating agent of the bank upon his indebtedness to the bank on his statutory liability as a stockholder, and he is not entitled to have the total amount of his deposit applied as a payment on the assessment made against him by reason of his statutory liability.

APPEAL by John F. McLean, petitioner, from *Cranmer, J.,* at May Term, 1929, of ROBESON. Affirmed.

This is a proceeding for the liquidation of the Carolina Bank and Trust Company, an insolvent banking corporation organized under the laws of this State. The proceeding was begun by the Corporation Commission of North Carolina, under the provisions of chapter 113, Public Laws of North Carolina, 1927, N. C. Code, 1927, sec. 218(c). An assessment was made by said Corporation Commission, as authorized by section 13 of said statute, upon the stockholders of said insolvent corporation, by reason of their statutory liability. C. S., Vol. III, sec. 219(a).

The petitioner, John F. McLean, alleges that the assessment made against him as a stockholder of said corporation is void, for that he was not a stockholder at the date of the insolvency of said corporation. He alleges that he had sold, or requested the cashier of said corporation to sell for him, the five shares of stock of said corporation, which he had purchased in 1917, prior to said date, and that, therefore, he is not liable to assessment as a stockholder.

The said petitioner alleges further, that if it shall be found by the court that he was a stockholder of said corporation, at the date of its insolvency, said assessment is void, as to him, for that section 13 of chapter 113, Public Laws of North Carolina, 1927, was enacted subsequent to the purchase by him of shares of stock in said corporation, and that said section 13, under which the assessment was made against him, is not applicable to him as a stockholder of said insolvent corporation. He alleges that a valid assessment can be made against him only under the statute in force at the date on which he purchased stock in said corporation.

The said petitioner, upon these allegations, prays that the assessment made by the Corporation Commission against him as a stockholder in this proceeding, be declared null and void, and that he be relieved of said assessment.

The said petitioner alleges further that at the date of the insolvency of said corporation, he was one of its depositors, having to his credit on its book amounts subject to his check; that the liquidating agent of said corporation, appointed by the Corporation Commission, as provided by statute, has refused to pay to him the dividends apportioned from the assets in his hands upon the amounts due him as a depositor, but has applied said dividends as payments on the assessment made againt him as a stockholder. He alleges that said liquidating agent is without authority to apply the said dividends as payments on said assessment, and that said dividends are due and payable to him, as a depositor and creditor of said insolvent corporation.

The said petitioner, upon these allegations, prays that he be declared the owner of and entitled to said dividends, and that said liquidating agent be ordered and directed to pay the same to him.

The material allegations of the petition, chiefly of law, are denied by the answer of the liquidating agent. He prays that the assessment made by the Corporation Commission against the petitioner, as a stockholder of the insolvent corporation, be declared valid, and that the application of the dividends apportioned to the petitioner as a despositor of said corporation made by him, be approved.

Upon the facts found by the court, in accordance with the agreement of the petitioner and the respondent, it was ordered and adjudged that the prayers of the petitioner be and the same were denied. From said judgment the petitioner appealed to the Supreme Court.

McKinnon & Fuller for petitioner.
I. M. Bailey and McLean & Stacy for respondent.

CONNOR, J. In 1917 the petitioner, John F. McLean, purchased five shares of the capital stock of the Carolina Bank and Trust Company, a corporation organized and engaged in the banking business, at Red Springs, N. C., under the laws of this State. The certificate issued to the petitioner for these shares of stock was endorsed by him and assigned to said company as collateral security for his note given for the purchase price of said shares of stock. This note was endorsed by J. D. McLean.

Annual dividends declared by said company on said shares of stock were paid from time to time to the petitioner, until 1921. During that year the petitioner notified the cashier of said company that he was insolvent and unable to pay his note, then held by said company; he requested the said cashier to sell the said shares of stock, and to apply the proceeds of said sale to the payment of said note. The said cashier attempted to sell the shares of stock, but was unable to do so. Dividends declared on the stock which stood in the name of the petitioner on the books of the corporation were not paid to him, after 1921, but were applied as payments on his note. At the date of the insolvency of the corporation, when the Corporation Commission of North Carolina took possession of its assets, under the provisions of chapter 113, Public Laws of North Carolina, 1927, five shares of its capital stock stood on its books in the name of the petitioner. The said shares of stock had not been sold by the petitioner or by the cashier of the corporation at his request.

Upon the foregoing facts there was no error in the finding by the court that the petitioner, John F. McLean, was a stockholder of the Carolina Bank and Trust Company at the date of its insolvency, and that as such he was liable to an assessment for an amount equal to the par value of said shares of stock. *Trust Co. v. Jenkins,* 193 N. C., 761, 138 S. E., 139. The facts in this case are easily distinguishable from the facts in *Darden v. Coward, ante,* 35, 147 S. E., 671. In that case the plaintiff, whose name appeared on the books of the insolvent bank as the owner of ten shares of its capital stock, had sold said shares of stock to the cashier of the bank prior to its insolvency, and at the date of such sale had transferred the certificate for same to said cashier, with directions that such cashier as transfer agent of the bank, cancel the certificate in the name of the plaintiff, and issue a new certificate to the purchaser. The failure of the cashier to make such transfer was due to his neglect and not to the fault of the plaintiff. In the instant case, no sale had been made; petitioner's certificate was in the possession of the bank as collateral security. The certificate had not been delivered by the petitioner to the cashier as the transfer agent of the corporation, with direction to transfer the same to a purchaser. The petitioner had done nothing to divest himself of his rights, or to relieve himself of his liabilities as a stockholder of the Carolina Bank and Trust Company prior to its insolvency.

The statutory liability of the petitioner as a stockholder of the Carolina Bank and Trust Company was not affected by the provisions of chapter 113, Public Laws of North Carolina, 1927. Such liability was not altered in its nature or enlarged in its extent. Only the procedure for its enforcement was affected by section 13 of said statute. In *Corporation Commission v. Murphey, ante,* 42, 147 S. E., 667, we held that the statute is valid, and that its only effect is to remedy defects which under the procedure formerly prescribed by statutes as construed by our decisions, had prevented an effective enforcement of the statutory liability of stockholders in banking corporations, organized under the laws of this State. Petitioner's contention that the statute is not applicable to him because it was enacted after he purchased his stock cannot be sustained.

The statutory liability of stockholders of banks organized under the laws of this State has been held to be contractual in its nature. For this reason it is held in *Smathers v. Bank,* 135 N. C., 410, 47 S. E., 893, that the statute enacted in 1897 should be construed to operate prospectively only. This principle does not apply to section 13 of chapter 113, Public Laws of North Carolina, 1927, for the reason that this statute does not impose any new liability, or enlarge the liability theretofore imposed by statute. It affects only the procedure by which the liability incurred by petitioner when he bought his stock may be determined and the sum for which he is liable may be assessed. The identical question here presented was decided in *Lamar v. Taylor,* 141 Ga., 227, 80 S. E., 1085, contrary to the contention of the petitioner.

The liability of the petitioner as a stockholder of the Carolina Bank and Trust Company, by reason of the statute, was for all "contracts, debts and engagements of the corporation," to the extent of the par value of his stock. He was liable equally and ratably with the other stockholders. This liability did not arise when the corporation became insolvent or when its assets were taken over by the Corporation Commission; nor did it arise when the assessment was made by the said Commission. It arose when the petitioner became a stockholder by the purchase of five shares of the capital stock of the corporation in 1917. The amount for which he is liable was determined by the assessment. He is now a debtor in said amount to the liquidating agent of the insolvent corporation, as the representative of its depositors and other creditors, and of its stockholders. When his assessment has been collected, its amount will be part of the general assets of the corporation and will be immediately available for distribution as provided by the statute. When the expenses of the liquidation have been paid, and all of the liabilities to creditors have been discharged, the assets then in the hands of the liquidating agent, if any, will be distributed *pro rata* to the stockholders. Section 13, chapter 113, Public Laws 1927.

Dividends upon the claims of petitioner as a depositor of the insolvent banking corporation, in the hands of the liquidating agent, are due by such agent and are payable by him to the petitioner. The petitioner is a creditor of the liquidating agent to the extent of the dividends apportioned to him out of the general assets of the corporation. These dividends were properly applied by the liquidating agent as payments on the amount due him by the petitioner, on account of the assessment. Equity and justice require that the liquidating agent, when he comes to settle with the petitioner, shall deduct the amounts of dividends due to him as a depositor, from the amount due by him to the liquidating agent on account of his assessment by reason of his statutory liability. *Davis v. Mfg. Co.,* 114 N. C., 321, 19 S. E., 371. It does not follow that a depositor who is also a stockholder of an insolvent banking corporation is entitled to have the total amount of his deposit applied as a payment on his assessment. Only the dividends apportioned to him as a depositor may be so applied. To hold otherwise, would be unjust and inequitable both to creditors and to other stockholders. We find no error in the judgment. It is

Affirmed.

S. M. DAVIS AND WIFE, FLORA M. DAVIS, v. UNION CENTRAL LIFE INSURANCE COMPANY ET AL.

(Filed 30 October, 1929.)

1. **Mortgages E a—The assignee of the mortgagee may enforce the mortgage security.**

   The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, C. S., 2591, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note.

2. **Mortgages H q—Refusal to continue action for junior lien holders to be made parties not erroneous where their interests protected by the decree.**

   Where the decree of foreclosure of a mortgage has been made by the court with the provision that all junior lien holders be notified of the time and place of the sale and to show cause at the next succeeding term why they should not be bound by the decree and sale, their rights are protected by the decree and the refusal of the court to continue the action for foreclosure so that they might be made parties is not held for error under the facts of this case.

CIVIL ACTION, before *Cranmer, J.,* at April Term, 1929, of BLADEN.

The record discloses that prior to 26 March, 1921, the plaintiffs, S. M. Davis and wife, owned a tract of land in Bladen County, containing about 501½ acres, and that on said date plaintiffs borrowed from the defendant, Union Central Life Insurance Company, the sum of $10,000, evidencing said indebtedness by notes secured by a deed of trust upon said land, to the defendant, Louis Breiling, trustee, which deed of trust was duly recorded in the office of the register of deeds of Bladen County. Having failed to make the payments due in 1926 and 1927, the plaintiffs borrowed from the National Bank of Fayetteville a certain sum of money and issued as evidence thereof a promissory note and secured the same by a second mortgage or deed of trust upon said property to A. B. McMillan, trustee for the National Bank of Fayetteville. Thereupon the National Bank of Fayetteville delivered to the defendant, Union Central Life Insurance Co., its certificate of deposit, payable 1 November, 1927, in the sum of $1,848. Thereafter, on 8 August, 1927, the National Bank of Fayetteville closed its doors by reason of insolvency and the Union Central Life Insurance Company could not collect the deposit of $1,848.58. Thereupon the Union Central Life Insurance Company directed Louis Breiling, trustee in the first deed of trust, to advertise and sell plaintiff's property. The land was accordingly advertised for sale on Wednesday, 14 December, 1927. Plaintiffs instituted an action on 12 December, 1927, against the Union Central Life Insurance Company and Louis Breiling, trustee, to restrain the sale of said property, alleging that the defendant, Union Central Life Insurance Company, had accepted the deposit of the National Bank of Fayetteville as a payment of the amount due by the plaintiffs according to the tenor of the notes. The Union Central Life Insurance Company contended that it had accepted deposit from the National Bank of Fayetteville as collateral security and not as payment. The controversy was heard by Sinclair, J., on 31 December, 1927, and a consent judgment was entered to the effect "that the defendant, Union Central Life Insurance Company, and its trustee, Louis Breiling, be and they are hereby restrained from exercising power of sale in the deed of trust referred to in the pleadings until 1 March, 1928." The judgment further provided that if the indebtedness was not paid on or before 1 March, 1928, that the power of sale should be exercised.

No further steps were taken in the matter until Louis Breiling, trustee, readvertised the property for sale on 29 October, 1928. The property was sold on said date and "was bid in by the Union Central Life Insurance Company for $10,000." On 8 November, 1928, and prior to the expiration of the ten days allowed by law, the LaFayette Bank and Trust Company, of Fayetteville, sent to Johnson-Johnson & Floyd, attorneys for Union Central Life Insurance Company, a check for $12,983.65, which was the amount of the indebtedness due the Union Central Life Insurance Company. Thereafter Johnson-Johnson & Floyd, attorneys, sent to the LaFayette Bank and Trust Company the notes and deed of trust held by the Union Central Life Insurance Company, said deed of trust bearing the following endorsement: "For value received and without recourse on us this deed of trust and the notes secured by the same are hereby transferred and assigned to D. U. Sandlin, trustee for the LaFayette Bank and Trust Company, together with all our right, title and interest in the same. This 17 November, 1928. Union Central Life Insurance Company, by Johnson-Johnson & Floyd, attorneys." The money sent by LaFayette Bank and Trust Company to Johnson-Johnson & Floyd was by them forwarded to the Union Central Life Insurance Company and retained by said company. Subsequently, on 29 December, 1928, the LaFayette Bank and Trust Company and D. E. Sandlin, trustee, upon notice and order of the court, were permitted to interplead in the action then pending between Davis and wife and the Union Central Life Insurance Company and Louis Breiling, trustee. The receivers of the National Bank of Fayetteville also filed answers, alleging in substance that the LaFayette Bank and Trust Company had paid off the mortgage of Union Central Life Insurance Company at the instance of plaintiff Davis, and that as a result thereof the second mortgage or deed of trust held by the National Bank of Fayetteville constituted the first lien upon the land of the plaintiff.

The cause came on for hearing, and the following issues were submitted to the jury:

"1. Were the notes and deed of trust securing the same transferred and assigned to the LaFayette Bank and Trust Company and D. E. Sandlin, trustee, as alleged?

"2. Has the mortgage indebtedness been paid?"

The trial judge instructed the jury to answer the first issue "yes," and the second issue "no." Judgment was signed, decreeing that the plaintiffs were indebted to the LaFayette Bank and Trust Company in the sum of $12,983.65, with interest from and after 8 November, 1928.

It was further ordered that in the event said amount was not paid by 10 June, 1929, the land should be sold, and commissioners were appointed to make the sale.

It was further ordered that all junior lien holders or judgment creditors of plaintiffs should be notified of the time and place of the sale, and further to show cause at the next term of court held after the sale why each of said junior lien holders or judgment creditors should not be bound by the terms of the decree and the sale had thereunder.

From the foregoing judgment the receivers of the National Bank of Fayetteville appealed.

Rose & Lyon for LaFayette Bank and Trust Company and D. E. Sandlin, Trustee, interpleaders.

R. W. Herring for A. D. Burrowes, receiver of the National Bank of Fayetteville.

BROGDEN, J. Two questions of law are presented for determination:

1. Can a third party purchase notes secured by deed of trust, after a sale of the property, under power contained in the deed of trust and within the period of ten days for increasing the bid, and thereafter enforce the security?

2. Was the receiver of the National Bank of Fayetteville entitled to a continuance of the cause for the purpose of permitting subsequent lien holders to be made parties to the suit?

The first question must be answered in the affirmative. The record discloses that the land was sold under the first deed of trust held by the Union Central Life Insurance Company on 29 October, 1928. Thereafter, on 8 November, 1928, the LaFayette Bank and Trust Company paid to the attorneys of the Union Central Life Insurance Company all sums due by virtue of the execution and delivery of the notes and deed of trust. Thereupon the attorneys for the lien holder assigned and delivered to the LaFayette Bank and Trust Company the notes and deed of trust evidencing the indebtedness and forwarded the money to the lien holder, and the money was retained without question.

Until the expiration of the ten days the Union Central Life Insurance Company, by virtue of having purchased the land at the sale, became "a mere preferred proposer until confirmation." *In re Sermon's Land,* 182 N. C., 122, 108 S. E., 497.

It has been expressly held by this Court in *Cherry v. Gilliam,* 195 N. C., 233, 141 S. E., 594, that a mortgagor can sell his interest in the mortgaged premises during the ten-day period described by C. S., 2591. If a purchaser of the land could acquire the title of the mortgagor during the ten-day period, by the same token a purchaser could acquire title to the notes and deed of trust held by the lien holder. Therefore, it necessarily follows that such purchaser of notes can enforce the security according to the tenor thereof.

Ordinarily, a continuance rests in the sound discretion of the trial judge. *Massey v. R. R.,* 169 N. C., 245, 84 S. E., 1047. Furthermore, subsequent lien holders or encumbrancers are proper parties to a suit of foreclosure—certainly if they seek to become parties, but they are not necessary parties in all cases. *Gammon v. Johnson,* 126 N. C., 64, 35 S. E., 185; *Barrett v. Barnes,* 186 N. C., 154, 119 S. E., 194; *Bank v. Watson,* 187 N. C., 107, 121 S. E., 181. However, in the present case it is provided in the judgment that the commissioner appointed to sell the property should notify all junior lien holders "to show cause before this court at the next term of court to be held after the sale, why each of said junior lien holders or judgment creditors should not be bound by the terms of this decree and sale, if any, to be held hereunder, as well as the price which may hereafter be offered for said property at public auction."

This decree, therefore, protected the rights of all parties concerned. The judgment is

Affirmed.

GEORGE W. SMITH v. ÆTNA INSURANCE COMPANY.

(Filed 30 October, 1929.)

1. **Insurance J b—In absence of valid waiver the provision in policy for forfeiture for nonpayment of premiums is valid.**

A policy of fire insurance for a term of years containing a provision excluding the insurer from liability for a loss that may occur while any installment note given for the premium remains past due and unpaid, by its valid terms does not render the insurer liable when the insured has not paid the premiums, but has given notes therefor, and a fire occurs after the maturity of the unpaid notes, in the absence of a valid waiver by the insurer of the provisions of the policy in this respect.

2. **Same—In this case held: evidence of waiver of provision for forfeiture for nonpayment of premium insufficient.**

Where a policy of fire insurance provides that the insurer would not be liable for loss covered by the policy during the time notes given for premiums were past due and unpaid, evidence that other policies issued the plaintiff, containing the same provisions had been reinstated upon the payment of the premiums, without evidence of demand by the insurer for the payment of the premium on the policy sued on after the maturity of the notes, is insufficient evidence of a valid waiver by the insurer of this provision, and the burden being upon the plaintiff to show a valid waiver, a motion as of nonsuit should be granted.

3. **Same—Where insured does not read policy his failure to do so is not evidence of waiver of provisions by insurer.**

Where an insured can read and understand his policy of fire insurance, and has full opportunity to do so, and the insurer does nothing to prevent him from reading the policy, the neglect of the insured to have acquainted himself with the conditions on which the policy was issued and written cannot be taken as evidence of the waiver by the insurer of the conditions imposed.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1929, of CUMBERLAND. Reversed.

Action to recover upon a policy of fire insurance. The validity of the policy at the date of its issuance, and the destruction by fire of the property insured thereby, are admitted. The question involved is whether the policy was in force at the date of the loss.

It is admitted that by reason of the default of plaintiff in the payment of his note for a portion of the premium for said policy, at its maturity, and of the continued default in such payment, the policy was not in force according to its terms at the date of the loss, and that defendant, by virtue of a provision in said policy, is not liable to plaintiff for the loss resulting from the destruction of his property by fire.

The premium note was due on 1 September, 1928. The loss occurred on 26 September, 1928. At the date of the loss, the note was past due and unpaid. No demand for the payment of said note was made by the defendant, after its maturity and prior to the date of the loss.

Plaintiff alleges that by its conduct prior to the maturity of said note defendant waived the provision in the policy and also in the note, that defendant should not be liable to plaintiff, under the policy, for any loss or damage to the property, insured thereby, if such loss or damage should occur while any note given for the premium or for any portion of the premium was past due and unpaid. This allegation is denied by the defendant.

The issues submitted to the jury were answered as follows:

"1. Did the defendant Ætna Insurance Company, waive the provision as to the payment of the note, as alleged in the reply? Answer: Yes.

2. What sum, if any, is plaintiff entitled to recover of defendant? Answer: $2,000, and interest from the date of the fire, less note, $33.16, and interest."

From judgment on the verdict defendant appealed to the Supreme Court.

Cook & Cook for plaintiff.
Vann & Millikin for defendant.

CONNOR, J. The policy of insurance issued by defendant to plaintiff, insuring the property described therein against loss or damage by fire for a term of five years from and after 2 November, 1927, contains a provision as follows:

"It is understood and expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned, while any installment note given for premium upon this policy remains past due and unpaid; or while any single payment, promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium, remains due and unpaid."

Plaintiff did not pay the premium for said policy, or any portion thereof, in cash. He gave two notes for said premium, one for $33.16, due on 1 September, 1928, and the other for $132.64, due in four equal installments of $33.16 on 1 December, 1928, 1929, 1930 and 1931, respectively. In both said notes there was a provision identical with that in the policy to the effect that upon default in the payment of said note, according to its terms, the defendant should not be liable to plaintiff under the policy, during the continuance of such default. But for the default of plaintiff in the payment of the note which was due on 1 September, 1928, the policy would have been in force at the date of the loss, to wit, 26 September, 1928. By reason of such default, however, the policy was not in force on said date, unless defendant had, as contended by plaintiff, by its conduct prior to the date of such default, waived the provision in the note and also in the policy.

In *Hayworth v. Insurance Co.,* 190 N. C., 757, 130 S. E., 612, it is said: "When a note is given for the payment of the premium on a life insurance policy and the note and the policy contain a stipulation that, upon the failure to pay the note at maturity, the policy shall cease and determine, then a failure to pay such premium note renders the policy void." This principle, well settled in this and other jurisdictions, is applicable not only to life insurance policies, but also to other policies, including fire insurance policies. *Moore v. General Accident, Fire and Life Assur. Corp.,* 173 N. C., 532, 92 S. E., 362. In the instant case, it is provided in effect that the continued default in the payment of the note for the premium, or for a portion thereof, after its maturity, suspends the liability of the company under the policy during the period of such default. If the company after such default accepts or demands payment of the note, the policy is thereby reinstated from the date of such acceptance or demand. If a loss occurs after the policy has thus been reinstated, the company is liable for such loss, according to the terms of its policy, notwithstanding the suspension of its liability during the period of default.

It is conceded by defendant that in accordance with authoritative decisions of this Court, notwithstanding the provision in the policy with respect to the effect of plaintiff's default in the payment of his premium note, upon the liability of the defendant, the defendant is liable under the policy if it has waived said provision, as alleged by plaintiff. The burden, however, is on the plaintiff to show such waiver.

On an examination of the record in this appeal, we fail to find any evidence showing or tending to show a waiver, by defendant, as contended by plaintiff. There was no evidence tending to show that defendant or its agents caused the plaintiff to fail to pay his note at its maturity, or to rely upon an extension of said note by defendant. The fact that defendant after the maturity of a note given by plaintiff for the premium on another policy, issued by defendant to plaintiff prior to the issuance of the policy in this case, accepted payment of said note and thereby reinstated the said policy, was not sufficient as evidence that defendant, at the date of the issuance of this policy, and the execution of this note, waived the provision in the policy and the note, with respect to the effect of a default in the payment of this note upon defendant's liability under this policy. Acceptance of payment of a premium note had the effect only of reinstating the policy from the date of such payment. There was no evidence in this case that plaintiff, either before or after its maturity, requested defendant to extend the date of the maturity of his note. Plaintiff testified that he can read and write. The fact that he did not know when his note became due, because he failed to read either the note which he signed, or the policy which was delivered to him, is not evidence tending to show a waiver by defendant. There is no evidence tending to show that plaintiff failed to read the note or the policy because of any conduct on the part of defendant or its agents.

There was error in the refusal of the court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence. The judgment must, therefore, be

Reversed.

STATE v. W. E. GREEN.

(Filed 30 October, 1929.)

Criminal Law I e—In this case held: abuse of defendant in solicitor's argument entitled defendant to new trial.

In a criminal action the defendant is entitled to the protection of the court against the unwarranted abuse of his character by the solicitor in his argument when not supported by the evidence or by reasonable inference therefrom, and a new trial will be awarded on appeal where the trial judge refuses the appeal to him by the defendant's counsel and affords no relief from the unwarranted imputations.

CRIMINAL ACTION, before *Cranmer, J.*, at May Term, 1929, of CUMBERLAND.

The defendant was convicted of the crime of assault upon his wife, and also of the crime of nonsupport, and sentenced to serve a term of thirty-six months. From judgment pronounced the defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Malcolm McQueen and Dye & Clark for defendant.

BROGDEN, J. The record shows the following:

During the argument of counsel the solicitor, in the closing address, spoke to the jury as follows: "Gentlemen of the jury, the defendant has made himself so obnoxious to the court that even his own counsel have deserted him." The defendant's counsel excepted to this statement by the solicitor. (One of the counsel for the defendant left the courtroom at the noon recess, and after all the evidence was in, and did not return before verdict, it being agreed there was to be but one argument to the jury by the defendant's counsel, and that by Mr. McQueen.)

The court failed to make any statement, and the Solicitor continued as follows:

"I have the supremest contempt, if that be a proper word, Mr. McQueen, for any man who will sink so low in society, as this defendant has done, and swear, falsely, that his wife has committed adultery and obtain a divorce on those false grounds. The first thing you know, gentlemen of the jury, this defendant will have some girl around here and fool her into marrying him, claiming he has a divorce, and he will be indicted for bigamy."

The defendant's counsel objected to these statements on the grounds that there was no evidence of a divorce on the ground of adultery, and that his counsel had not deserted him, and therefore, the solicitor should not draw conclusions which were not supported by the facts and the evidence.

The court again failed to interpose, and the solicitor was allowed to continue this line of argument and statements without interruption.

The defendant excepted.

In *Lamborn v. Hollingsworth*, 195 N. C., 350, 142 S. E., 19, this Court said: "Under our law it is the undoubted right of counsel to argue every phase of the case supported by the evidence without fear or favor, and to deduce from the evidence offered all reasonable inferences which may flow therefrom. The testimony and conduct of witnesses and parties must at all times be subject to such criticism and attack as the circumstances reasonably justify. However, the baiting and badgering of witnesses and parties ought not to be permitted by the court. Parties come into court, as they have a right to do, to have controversies determined according to the orderly processes of the law, and witnesses are compelled to come to court whether they desire to do so or not. At all events, as long as they demean themselves in a courteous manner they are entitled to the same courtesy in the courthouse as would be accorded to a citizen in any other business transaction."

The argument made in behalf of the State exceeded the limit of fair comment, and was not justified by the evidence introduced in the cause. The defendant testified "that he had maintained his residence in Florida all of his life and, after the warrant was issued, got a divorce there." Hence there was nothing in the evidence to indicate that the divorce was secured upon the ground of adultery or that the defendant was attempting to fool any girl into marrying him or that there was any probability of an indictment for bigamy.

The defendant, according to the orderly processes of law, appealed to the court for protection, and did not receive it. He is, therefore, entitled to a

New trial.

STATE v. LEE ELDRIDGE.

(Filed 30 October, 1929.)

Homicide C b—Where negligence of deceased was sole proximate cause of death defendant is not guilty of manslaughter.

Where in a prosecution for manslaughter for the negligent killing of the deceased through the reckless driving of an automobile, the defense is interposed that the deceased met her death through her own negligence in unexpectedly running in front of defendant's car under circumstances making it impossible for him to avoid striking her: *Held,* the defendant is entitled to show as a complete defense that the death was caused by the act of the deceased and not by his negligence, and an instruction that denies him this right is reversible error to his prejudice entitling him to a new trial. The doctrine of contributory negligence does not apply.

APPEAL by defendant from *Moore, J.,* at April Term, 1929, of SURRY.

Criminal prosecution tried upon an indictment charging the defendant with the unlawful killing of Mrs. Will Quesinberry by striking her with an automobile while operating same on a public highway in a dangerous and reckless manner.

The defense interposed was unavoidable accident, and the defendant offers evidence tending to show that the deceased, in an effort to cross the road, negligently and unexpectedly ran in front of his car, under such circumstances as to render it impossible for him to avoid striking her.

Verdict: Guilty of manslaughter, with recommendations of mercy.

Judgment: Imprisonment in the State's prison for not less than five nor more than ten years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Folger & Folger for defendant.

STACY, C. J. The validity of the trial is called in question by a number of exceptions and assignments of error, but detailed consideration of them is omitted, as the Attorney-General confesses error, and we find it necessary to award a new trial for error in the following instruction:

"If you find beyond a reasonable doubt that the boy was driving the car at such a rate, at the time he hit the deceased that his car was not under control, so as to stop and save the life of this woman, however negligent she may have been, it would be your duty to find him guilty of manslaughter."

This instruction took from the defendant his plea of misadventure or unavoidable accident, and deprived him of the contention that the negligence (not contributory negligence) of the deceased was the sole proximate cause of her death. *S. v. Palmer, ante,* 135. Contributory negligence on the part of the deceased, which *ex vi termini* implies that the negligence of the defendant was one of the causes of the injury, as distinguished from a self-inflicted wound, which perforce carries a different meaning, has no place in the law of the case. *S. v. McIver,* 175 N. C., 761, 94 S. E., 682. But the defendant is entitled to show, if he can, that the deceased met her death, wholly as a result of her own misfortune, and not because of any culpable negligence on his part. *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6.

New trial.

STATE v. T. S. CORNETT AND TWAY CORNETT.

(Filed 30 October, 1929.)

Criminal Law L e—Appeal in this case was not from final judgment and was dismissed in the Supreme Court.

Where the judgment in a criminal action for a misdemeanor has been suspended until the trial of a civil action against the defendant, the cost is no part of the punishment, the effect of the imposition of cost being to vest the cost in those entitled thereto, and an appeal therefrom, not being from a final judgment or one which is final in its nature, will be dismissed.

APPEAL by defendants from *Moore, J.*, at April Term, 1929, of ASHE. Appeal dismissed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. R. Bauguess for defendants.

ADAMS, J. The defendants were indicted and convicted of wilfully injuring and removing a fence surrounding a cultivated field in breach of C. S., 4317. Judgment was suspended, upon payment of the cost, until the termination of a pending civil action. The order for the payment of the cost is not a part of the punishment which may be imposed for the commission of a misdemeanor, the legal effect of the order being only to vest the right to the cost in those entitled to it. *S. v. Crook,* 115 N. C., 760; *S. v. Smith,* 196 N. C., 438. As no final judgment has been pronounced, the appeal must be dismissed. In a criminal action an appeal may be taken only from a final judgment on conviction or from one which in its nature is final. *S. v. Bailey,* 65 N. C., 426; *S. v. Jefferson,* 66 N. C., 309; *S. v. Wiseman,* 68 N. C., 203; *S. v. Webb,* 155 N. C., 426; *S. v. Tripp,* 168 N. C., 150.

Appeal dismissed.

ZEB. V. MOSELEY, ADMINISTRATOR OF THE ESTATE OF LESLIE DAVIS, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 October, 1929.)

1. **Railroads D b—In this case held: evidence of defendant's negligence causing injury at crossing sufficient to be submitted to the jury.**

In an action to recover damages for the negligent killing of the plaintiff's intestate, evidence tending to show that the defendant's rapidly moving train collided with an automobile the plaintiff was driving at a much used public crossing, coming upon him without signal or warning at a place where the defendant's tool and supply houses obstructed the intestate's view so that he could not apprehend the danger in time to avoid it, is sufficient to take the case to the jury upon the question of whether the defendant's negligence was the proximate cause of the injury in suit.

2. **Same—Testimony of witnesses that they did not hear approaching train give warning is sufficient to be submitted to the jury.**

Where the plaintiff's intestate has been killed in a collision of his automobile with the train of the defendant at a public crossing, and the question is involved as to whether the defendant negligently omitted to give warning of its approaching train, testimony of witnesses who were present that they did not hear the bell ring or the whistle blow is sufficient to take the case to the jury on this question.

3. **Same—In this case held: question of plaintiff's negligence in failing to stop before crossing was for the jury.**

Where there is evidence that the defendant's train colliding with an auto truck of the plaintiff's intestate as he was attempting to cross the defendant's tracks at a public crossing, with the train speedily coming upon him without warning, the question is for the jury as to the negligence of the intestate in failing to stop before attempting to cross under the rule of the prudent man under the facts of this case.

4. **Same—Question of whether crossing was extraordinarily dangerous requiring watchman or gongs was for the jury in this case.**

While it is negligence *per se* for a railroad company not to observe a statutory requirement of maintaining gates or safety devices, or watchmen at a grade crossing, it is also incumbent upon it, in the absence of statute, to do so when the crossing is much used by the public and is more than ordinarily dangerous, and the failure to do so would be a great menace to the public, and the question of whether or not such precautions were required is for the jury under correct instructions under the evidence in this case.

APPEAL by defendant from *Nunn, J.*, and a jury, at February Term, 1929, of LENOIR. No error.

This is an action for actionable negligence brought by plaintiff, administrator of Leslie Davis, against the defendant for killing his intestate at a street crossing. The defendant denied negligence and pleaded contributory negligence.

Leslie Davis, a young white man about 30 years old, drove a truck selling bottled soft drinks in crates, for one W. F. Tyndall, who lived in Kinston, who was in the bottling business. Davis drove a Chevrolet truck weighing about 2,500 to 3,000 pounds, which usually carried a load of 3,000 to 4,000 pounds. The truck had a cab the width of about $3\frac{1}{2}$ to 4 feet. The distance from the front of the truck to the back of the driver's seat was $7\frac{1}{2}$ feet. The front of the truck was $6\frac{1}{2}$ feet from the driver. On the morning of 6 April, 1927, he left the city of Kinston with a negro boy, Joe Smith. Davis was driving the truck; they went to Goldsboro, Pine Level, Selma and then to Smithfield. They drove across the railroad tracks on Johnson Street and stopped at Jim Obey's store on the east side of Johnson Street and on the east side of defendant's railroad. The store was on the south side of the street. Joe Smith usually handled the crates. After making a delivery at Obey's store, they got in the cab, Davis at the wheel and Smith beside him. The cab was the usual one of such trucks, closed with doors on both sides, six windows counting the front one—nothing to obstruct the view of one riding in the cab.

The railroad ran north and south, and Johnson Street east and west. There were four tracks of the defendant railroad that crossed Johnson

Street and a spur track branching out from the first east track leading to the ice plant on the north side of Johnson Street. The tracks of defendant are within the corporate limits of Smithfield. From the east side of the northbound main line track, the second east track which passenger train No. 80 was on, which killed Davis, to the side of Obey's store is 67 feet. There was a roadway, alley or lane about 20 feet wide to the west of Obey's store going south and back of and to the east of two railroad houses which faced the railroad, the two houses fronting on track one. A tool house 14.4 feet by 16.4 feet and 11.2 feet high, a few feet from Johnson Street, and a supply house a few feet south of the tool-house, which is 30.4 feet by 12¾ feet and 15.7 feet high. Before reaching Johnson Street, south of these two houses, the tracks of defendant company curve practically all the way down about a quarter of a mile south of Johnson Street. The tool-house is 10 feet from the eastern rail of the first track. From the tool-house to the northbound main line track, the eastern edge of same is about 26 or 27 feet. From the supply house to the east rail of the northbound main line track is about 24 or 25 feet. From the center of the sidetrack to the center of the main line track is 15 feet. The distance from the east rail of the northbound track to the east rail of the pass track that you reach before getting to the northbound track is 15 feet. Between the rails it is about 4.9 feet. A person driving from east to west on Johnson Street when he reached a point on Johnson Street 25 feet from the east rail of the main line, the track the train was on which killed Davis, looking south his view would hit the tool and supply houses. After he cleared the houses at a point 23 feet from the east rail of the main line, his view would hit the curve some 147 yards down the track—12 feet from the east edge of the rail of the northbound track he could see down the track 800 feet. Driving in a car the front end "would be on the side track (first track) adjoining the main line (second track) before he could see any distance towards the south down that main line track" in the direction the train No. 80 was coming, which killed Davis. "After clearing those buildings going towards the main line, I would say you could see 250 feet" (about 84 yards).

Numerous witnesses testified that they heard no whistle of the train or bell rung for Johnson Street crossing; no signal until the emergency whistle blew three short blows right close together about 50 feet of the crossing where Davis was killed. When the engineer applied the brakes from the looks of the rail there were blue places—two on each rail opposite each other, like something had rubbed it and turned it blue. "I know what they were; they looked like friction marks from the application of brakes." They were 30½ feet from the center of the plank crossing. No. 80 was a little late, running 35 to 40 miles an hour.

There was continuous traffic across Johnson Street used by automobiles, trucks, bicycles and all kinds of conveyances and as a walkway. At the time there was a negro school in session; about 500 children attend the school and about 75 per cent have to cross Johnson Street to go to school; near the crossing there are two stores on the south side and an ice-house on the north side. "There are probably 75 houses, stores, churches and schoolhouses on the east side of the railroad where Johnson Street runs; that is the way they get across there unless they go through and strike the old No. 10 about a quarter of a mile. Johnson Street is our only way in and out; it is used largely." At the crossing "there are no gates kept there by the railroad company, no bells, gongs or devices of any kind to warn of the approach of trains, and no watchman there." Near the ice plant, across the street from Obey's store, is a "N. C. Law Stop" sign facing the east approach of the crossing.

When Davis and the negro boy got in the cab of the truck the truck was facing east and within the zone between the railroad and the stop sign. The Chevrolet truck was in good condition, practically new; perfect mechanical condition. The motor was in fine condition. Davis was a good driver.

From the center of the intersection of Johnson Street to the main line of the defendant company's railroad to the center of the depot, which is north, is 223 feet. From the center of Johnson Street crossing to where the truck was found after the wreck and carried by the train, was 300 feet. The body of Davis was carried by the train 140 feet from the intersection of Johnson Street. The body of Davis was found between the two east tracks. The train that killed Davis was on track two, and the truck was thrown off on the same side as the body—both thrown on the east side of the main line track two that the train was on. Johnson Street crossing over the tracks was built of dirt and rock and timber, 10-inch plank, on both sides of the rails on the second track to make the approach even with the rails. The approach was on a slight incline. "On the pass tracks the rails are level with the street. The rails of the main line tracks are larger than the rails on the pass tracks—stand up higher on the track and are heavier." The train consisted of "four express cars, a mail storage, mail postage, baggage car, colored coach, white coach, and New York Pullman, and in addition to that the engine and tender." The average car is about 60 feet and the engine about 100 feet, total length of train 700 feet.

The train approaching Johnson Street, the rear end of the last coach was 5.8 feet lower than the front of the engine.

"The truck backed back from in front of Obey's store on the side just off to one side of the street, and that made it face the railroad, and it curved out and started on across the railroad track. Approaching the railroad track from the east going along Johnson Street towards Smithfield you do not have any view down the track to begin with on account of the obstruction of these two houses until you get beyond those houses going toward the railroad. You would have to get down beyond, in other words, by these two houses on the right-of-way; that would put you about to the first sidetrack." "Johnson Street in front of Obey's store is about 20 to 25 feet." "As to the construction of the crossing, the only thing I know is there is a board on each side of the T-iron, and then there is dirt, and it is a narrow crossing about 10 feet wide." It was in evidence that trains were frequently crossing Johnson Street day and night.

Joe Davis, the negro boy, described what happened thus: "After we delivered the drinks to Obey's store this day we got in the truck and backed right short around Obey's store corner; there is a little lane down there; we backed the truck from in front of this first store, then we started on across the railroad. At that time I was in the truck—in the cab with Mr. Davis. I was looking to the right and he was looking to the left; the right is towards the depot. I did not hear any train blow until it was right on us. The first knowledge I had that there was a train coming, I looked toward the station to the right, and the people were all looking that way; looked like they were mad or something, and I looked down to the south and saw the train coming. At that time it was a little over 100 yards from us, and at that time the truck was between the first and second tracks, and the front wheel was on the track on which the train was coming. When the train got there right on us, it got almost on the running board when it blowed; he blowed the death blow, and I jumped out between the tracks. When I first saw the train it was a little further from us than from here to the rear of this court-room; I could not tell how fast it was traveling. When I saw the train I said, 'Lordy, Mr. Davis, there comes the train,' and he said 'Lord God,' and I jumped out. I had my foot on the running board when the train blew the three whistles; then when the train hit the truck I had just passed the back end of the truck running. . . . The truck was traveling about 10 miles an hour. We had not changed gears. He generally crossed clear across the track in low gear; he had not gotten out of low gear at the time the accident happened. When I jumped out the truck was running 10 miles an hour; when I jumped out I was facing towards the east; I jumped out backwards. I had to catch myself and start back the other way and run."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the death of the intestate, Leslie Davis, caused by the negligence of the Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: Yes.

2. Did the said Leslie Davis, by his own negligence, contribute to his death, as alleged in the answer? Answer: No.

3. What amount of damages, if any, is the plaintiff entitled to recover for the death of the said Leslie Davis? Answer: $15,000."

The defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones will be considered in the opinion.

Manning & Manning and F. E. Wallace for plaintiff.
Rouse & Rouse for defendant.

CLARKSON, J. The first main assignment of error by the defendant was to the refusal of the court below at the close of plaintiff's evidence, and at the close of all the evidence, to dismiss the action or for judgment as in case of nonsuit. C. S., 567. This assignment of error cannot be sustained.

As often repeated: "It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim, and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Goss v. Williams,* 196 N. C., at p. 216.

The evidence was conflicting in many respects, but we must consider it in the light most favorable to the plaintiff, taking into consideration all the evidence. In the town of Smithfield plaintiff's intestate and his negro helper crossed the railroad tracks on Johnson Street going east in a truck. After delivering from the truck bottled drinks at the first store on the south side of Johnson Street, they started to recross. They both entered the cab, plaintiff's intestate at the wheel, the negro boy by his side. The cab was then facing east. The driver backed the truck into a lane or alley between the store and the first railroad track to turn so as to cross the railroad. The driver's seat was 6½ feet from the front of the truck. He had to cross the first track and the main northbound track (second) going west. The crossing on Johnson Street over the second track was only 10 feet wide—that was the width of Johnson Street at that point—at least that was the length of the timber placed on each side of the T-rails so that vehicles could climb over. He had to adjust the heavy truck to the narrow passage provided over the T-rails. The train was approaching this crossing on the main northbound track (second) running 35 to 40 miles an hour, without any signals being heard, either whistle or bell for the crossing. The crossing was in a thickly settled portion of a town, much traveled, with no device of any kind or watchman to give warning of the approach of trains. The train was coming north around a curve, the vision of plaintiff's intestate was obstructed by a tool and supply house of defendant company. Plaintiff's intestate was looking to the left in the direction that the train was coming. It was impossible for him to see the oncoming train on account of the obstructions. He was a good driver, the machine in perfect mechanical condition, running 10 miles an hour in low gear. As he proceeded and passed where he could get a vision of the oncoming train from where he was sitting, it was only 23 feet from the main track on which the train was coming, and from the cab where he was sitting to the front of the machine was 6½ feet. He had only 16½ feet for the machine to travel before reaching track two, which the oncoming train was on, and could only see, by the testimony of one witness, about 84 yards, and another 147 yards, down the track. Thus, from the evidence, he got in this perilous danger zone. The machine did not get over the second track; the rails between the tracks were 4.9 feet. Plaintiff's intestate's body was carried about 140 feet and the truck carried about 300 feet, and both thrown off on the east side of the main track. As a matter of law, we think there was sufficient evidence to be submitted to the jury on the question of negligence and contributory negligence, and the court below correct in refusing to nonsuit plaintiff.

In *Russell v. R. R.,* 118 N. C., at p. 1108, it is said: "It is the duty of an engineer in charge of a moving train to give some signal of its approach to the crossing of a public highway over a railway track or to a crossing which the public have been habitually permitted to use; and where he fails to do so, the railway company is deemed negligent and answerable for any injury due to such omission of duty." *Perry v. R. R.,* 180 N. C., 290; *Rigsbee v. R. R.,* 190 N. C., 231; *Earwood v. R. R.,* 192 N. C., 27; *Franklin v. R. R.,* 192 N. C., 717; *Finch v. R. R.,* 195 N. C., 190.

In *Franklin v. R. R., supra,* at p. 719, it is said: "The plaintiff testified that he heard no signal prior to or at the time he stepped upon the crossing. This is some evidence that no signal was given. . . . The law makes it the duty of the person using a crossing of a railroad track to make diligent use of his senses in order to discover whether there is danger of injury or collision."

"Failure to stop before crossing a railroad track cannot be declared to be contributory negligence as matter of law, but that it should be considered by the jury in connection with the surrounding circumstances in determining whether the party was exercising the care of one of ordinary prudence." *Perry v. R. R., supra,* at p. 297.

In *Shepard v. R. R.,* 166 N. C., at p. 545, it is said: "It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances to each particular case, and so is usually a question for the jury.' *Barber v. R. R.,* 193 N. C., at p. 694-5."

The law is thus stated in *Williams v. R. R.,* 187 N. C., at p. 353: "*Goff v. R. R.,* 179 N. C., 216, as already stated, cites the rule laid down in *Edwards v. R. R.* (129 N. C., 79), that the failure to hear signals is sufficient to carry the case to the jury, and it was further held: 'If his (plaintiff's) view is obstructed, or his hearing the approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and, induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if it was dangerous ahead, negligence will not be imputed to him, but to the company, failure to warn him being regarded as the proximate cause of any injury received,' citing *Mesic v. R. R.,* 120 N. C., 490; *Osborne v. R. R.,* 160 N. C., 309."

"It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man." Bigelow, Torts, 261.

"Contributory negligence is the negligent act of a plaintiff which, concurring and coöperating with the negligent act of the defendant, is the proximate cause of the injury. The same rule of due care which the defendant is bound to observe applies equally to the plaintiff. There is really no distinction between negligence of the plaintiff and negligence of the defendant, except the plaintiff's negligence is called contributory negligence. The law further says, . . . that contributory negligence may consist of some act of omission or act of commission. It is the lack of due diligence or the lack of due care in doing the wrong thing at the time and place, or in doing nothing when something should have been done. That is to say, did the plaintiff fail to exercise due care which an ordinarily prudent man would have exercised under similar circumstances, and was said failure so to do the proximate cause of his injury?" *Inge v. R. R.,* 192 N. C., at p. 531. The above charge on contributory negligence held correct. *Certiorari* denied. 273 U. S., 753. It goes without saying, as it is so well settled, that the proximate cause of an injury is for the jury. A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence and certain conduct of a plaintiff contributory negligence and take away the question of negligence and contributory negligence from the jury. The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court.

"Plaintiff, while attempting to cross the tracks of defendant in the city of Sioux Falls collided with a train of defendant and the automobile in which he was riding damaged. Plaintiff claims the accident was caused by the negligence of defendant's employees by reason of their failure to blow the whistle or ring the bell of the engine when approaching the crossing. Defendant pleads contributory negligence on the part of plaintiff in not keeping a proper lookout for the train as he approached the crossing and in not using due care under all the circumstances: *Held,* that when it is considered that the space between the first view and the rail was only twenty-five feet, and the space within which a safe stop could be made was much less owing to the projection of the automobile ahead of the driver's seat and of the cars of the train over the rail, and after allowing time to look both ways, operate the brakes and come to a standstill the court cannot say respondent was negligent in failing to stop far enough from the track to escape injury. It is one's duty to use due care, but what acts constitute due care under all the circumstances cannot be prescribed in advance, and when not so prescribed, whether or not due care was exercised becomes a question of fact for a jury and not one of law for the court." *Morrisey v. Chicago, Milwaukee & St. Paul Ry. Co.,* So. Dakota, 226 Northwestern Reporter, p. 731.

In the case of *Harrison v. R. R.,* 194 N. C., 656, the plaintiff's witness testified, "there is nothing in the world to keep a man from seeing the train approaching from the south if he would look before he got on the track." Harrison's intestate, Lomax, had stopped his machine waiting for the freight train going southwardly to pass over the crossing. "If Mr. Lomax had looked from where he was sitting in his automobile, I would say, in my judgment, he could have seen the train, which struck him, approaching for a distance of 75 or 100 yards."

In the case at bar, plaintiff's intestate was looking to the left—the direction the train was approaching. His view had theretofore been obstructed by defendant's houses. His machine was running; whether he could have stopped in time was a question of due care for the jury. We think the *Harrison case* is distinguishable from the present action.

The second main assignment of error by defendant was to the effect that the court below improperly instructed the jury in regard to the duty of defendant in reference to safety device or watchman at the crossing where plaintiff's intestate was killed. This assignment of error cannot be sustained.

There was continuous traffic across Johnson Street used by automobiles, trucks bicycles, and all kinds of conveyances and as a walkway. At the time there was a negro school in session; about 500 children attend the school and about 75 per cent have to cross Johnson Street to go to the school; near the crossing there are two stores on the south side and an ice-house on the north side. "There are probably 75 houses, stores, churches and schoolhouses on the east side of the railroad where Johnson Street runs; that is the way they get across there unless they go through and strike the old No. 10 about a quarter of a mile. Johnson Street is our only way in and out; it is used largely." At the crossing "there are no gates kept there by the railroad company, no bells, gongs or devices of any kind to warn the approach of trains and no watchman there."

On the evidence the court below charged the jury as follows: "A railroad company is not legally bound to provide and maintain gates at street and highway crossings along its line, unless so required by statute or ordinance, or unless it appears that the particular crossing is peculiarly dangerous. In the absence of a statutory requirement it is not negligence *per se* (in itself) for a railroad company to fail to maintain a flagman or watchman at a grade crossing of its track and a public road to warn travelers on such road of approaching trains. The mere absence of a statute requiring a flagman or watchman at crossings will not, however, of itself relieve the railroad company from the duty to maintain one, and where a crossing is so peculiarly dangerous that the reasonable safety of the traveling public requires the presence of a flagman or other extraordinary means to signal the approach of the trains, it is incumbent upon the railroad company to employ such means. It is for the jury to say whether under all the circumstances of a particular case the railroad has been guilty of negligence in not maintaining a flagman or watchman at a particular crossing. Before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or watchman at a crossing, it must first be shown that such crossing is more than ordinarily hazardous, as for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects proper in themselves. The frequency with which trains are passing, and the amount of travel, or noise, are also material circumstances in considering the question of danger."

It will be noted that the court below charged in the present action on the evidence: "It must first be shown that such crossing is more than ordinarily hazardous, as for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects proper in themselves.

The frequency with which trains are passing, and the amount of travel, or noise, are also material circumstances in considering the question of danger."

In *Batchelor v. R. R.,* 196 N. C., at p. 87, speaking to the subject, it is said: "Applying these principles of law to the facts disclosed by the record, there is no evidence of obstruction existing at this crossing; neither is there evidence that the vision of a traveler was obscured by curves, embankments, buildings or other conditions, which rendered the crossing more than ordinarily hazardous, nor does the record disclose any condition of peculiar danger. Therefore, we hold that the failure of the defendant to maintain gates or gongs at this crossing was no evidence of negligence."

In the present action the evidence was plenary to be submitted to the jury that the vision of the traveler was obstructed which rendered the crossing more than ordinarily hazardous and peculiarly dangerous. It must be borne in mind that this was not a country crossing, or in a thinly settled community, but a street of a town thickly populated, much traveled, a busy thoroughfare. Defendant's train frequently passed it day and night. *R. R. v. Ives,* 144 U. S., 408; *Dudley v. R. R.,* 180 N. C., 34; *Blum v. R. R.,* 187 N. C., 640; *Finch v. R. R., supra.*

It will be noted that in all the cases in this jurisdiction where the question was left to the jury, the evidence was similar to that in the present action. The evidence was different in the *Batchelor case, supra,* the evidence was that "plaintiff's intestate was traveling on a much traveled road as a county road, but not as a highway." The *Batchelor case, supra,* is annotated in 60 A. L. R., 1091. The annotations give numerous citations from many States and cites the *Batchelor case* under the following, at p. 1096(a): "It may be stated generally that, unless required by statute or order, a railroad company is under no duty to provide gates, gongs, or other safety devices at public crossings, and that, therefore, the failure to do so at any particular crossing is not negligence *per se.*" The *Dudley* and *Blum cases, supra,* are annotated at p. 1196(b): "Where the evidence shows that a railroad crossing is for any reason peculiarly dangerous, it is a question for the jury whether the degree of care which a railroad company is required to exercise to avoid accidents at crossings imposes on the company the duty to provide safety devices at that crossing." The *Batchelor case, supra,* sustains this position.

The following is set forth in Roses' Notes on United States Reports, Revised Ed., Supplement, Vol. 3, at p. 197: "Whether ordinary care of deres flagman at crossing is for jury. Followed in *Panama Railroad* where *py v. Pigot,* 254 U. S., 553, 65 L. Ed., 43, 41 Sup. Ct., 200, in be sustair death of minor of seven years, question of whether proper care required railroad to have flagman or gate at crossing was for jury. *Lofland's Brickyard Crossing Cases,* 5 Boyce (Del.), 157, 91 Atl., 288, in action for injuries in crossing accident, failure of railroad to station flagman at crossing is evidence to be submitted to jury; *Glanville v. Chicago R. I. & P. R. Co.,* 190 Iowa, 180, 180 N. W., 155, in action for injuries received in collision of automobile with train, failure to maintain flagman or signaling device is not basis for charge of negligence, *in absence of showing crossing is unusually dangerous; Wichita Falls & N. W. Co. v. Grovers,* 81 Okla., 53, 196 Pac., 678, in action for death from backing of train at railroad crossing, whether railroad was negligent in not maintaining flagman or automatic signals, though no statute or ordinance required them, was for jury." (Italics ours.)

We think the court laid down the rule in the charge approved in this jurisdiction in this particular action. The generalities in the charge on the subject is not so antagonistic or conflicting as would be held prejudicial or reversible error, as was held in *May v. Grove,* 195 N. C., 235.

The third main assignment of error by defendant was in regard to the charge on sudden peril and emergencies. We do not think this can be sustained. *Parker v. R. R.,* 181 N. C., at p. 103; *Odom v. R. R.,* 193 N. C., 442. The other assignments of error as to admissibility of testimony and other exceptions to the charge, we do not think, if error, are reversible or prejudicial. On the whole record it appears that the court below tried the action with care and the charge covered every phase of the law bearing on the evidence. We can find in law

No error.

W. B. BRYANT v. BURNS-HAMMOND CONSTRUCTION COMPANY.

(Filed 30 October, 1929.)

1. **Appeal and Error G b—Exceptions not discussed in briefs are deemed abandoned.**

   Where in grouping exceptions taken upon the trial the appellant does not bring forward in his brief others he has taken, the latter will be regarded as abandoned. Rules of Practice, 192 N. C., 853, 28.

2. **Appeal and Error J e—Admission of testimony of matters admitted in pleadings and testified to by others will not be held for error.**

   Where the physician of the plaintiff who attended him after a personal injury he had received testifies as to matters the plaintiff had told him after the injury, the admission in evidence of the testimony of the physician will not be taken as error when the matter objected to has been admitted in the pleadings and is cumulative of evidence of other witnesses not objected to.

3. **Evidence K b—Expert witness may testify to symptoms complained of at time of examination by the person injured.**

In an action to recover damages for an alleged personal injury it is competent for the attending physician to testify as to what his patient told him of his symptoms and physical condition at the time of the physician's examination.

4. **Trial B c—Where objection is not made to question a motion to strike out responsive answer will not be allowed.**

Where the master is sued for damages for a negligent injury inflicted on his servant by reason of defective tools or appliances furnished the latter to do his work, an exception must be duly taken to an incompetent question calling forth admission of the master's vice-principal, and when taken only to the answer of the witness on motion to strike out, the exception will not ordinarily be considered on appeal when the answer is responsive to the question.

5. **Master and Servant C b—Doctrine of res ipsa loquitur applies in this case.**

Where it is shown that the servant in using an electrically driven saw furnished him by the master and under the master's control, has been injured in its use by an electrical shock which would not ordinarily occur under the circumstances, a presumption of the master's negligence in furnishing an improper appliance will arise, which does not affect the burden of proof in the servant's action, but which is sufficient to sustain an affirmative answer to the issue of negligence unless the defendant has satisfied the jury otherwise under the evidence.

APPEAL by defendant from *Sinclair, J.*, at May Term, 1929, of ALAMANCE. No error.

The defendant is a corporation, and on 6 August, 1928, was engaged in the construction of a manufacturing building in the city of Burlington. The plaintiff was employed by the defendant as a laborer on the building, and was required or permitted by the defendant to use a saw which was propelled by electricity. He alleges that the defendant negligently provided for him a defective saw, and that by reason of the defect, while engaged in the performance of the duties for which he was employed, he was injured by an electric shock transmitted by means of or on account of the defective tool with which he was required to work. The defendant denied the material allegations of the plaintiff, and at the trial the issues of negligence, assumption of risk, and contributory negligence were answered against the defendant and damages were duly assessed. Upon the verdict judgment was rendered for the plaintiff and the defendant excepted and appealed upon assignments of error pointed out in the opinion.

Long & Allen for plaintiff.
Coulter, Cooper & Carr for defendant.

ADAMS, J. The defendant groups some of its exceptions under four assignments of error and abandons several others which were taken on the trial, but were not brought forward in its brief. Rules of Practice, 192 N. C., 853, 28. In our opinion neither assignment can be sustained.

In the first it is contended that Dr. Brooks was permitted in his direct examination to relate what the plaintiff had told him in reference to his past condition—that, in consequence, the physician's testimony consisted of a statement of past occurrences which should not have been admitted in evidence. The witness said, "He (the plaintiff) told me he received an electric shock last August in his right shoulder." This is the only reference to the plaintiff's previous condition. That he had received an electric shock was admitted in the defendant's answer, and this admission was not controverted on the trial. Evidence that the plaintiff, when examined by the witness, described his physical condition and complained of headache and dizziness was clearly competent. *Roulhac v. White,* 31 N. C., 63; *Biles v. Holmes,* 33 N. C., 16; *Howard v. Wright,* 173 N. C., 339; *Martin v. Hanes Co.,* 189 N. C., 644.

G. A. Barkley, a witness for the plaintiff, testified as follows:

"Q. State what, if anything, Mr. Lloyd said about this saw Mr. Bryant was using? A. He said there was a shortage in the saw."

Defendant objects and moves to strike out. Decision reserved.

"Q. Who said that? A. The superintendent.

Q. When was this? A. Some two weeks after he was hurt.

Q. Was Mr. Lloyd connected with the Burns-Hammond Construction Company at the time of the conversation? A. I don't know. Mr. Bryant said he was.

Q. Where did you find Mr. Lloyd at the time? A. On the job up there."

Defendant renews motion to strike out the testimony concerning what Mr. Lloyd, the superintendent, said about the saw some two weeks after the occurrence. Overruled.

It will be observed that the defendant did not object to the first question, but moved to strike out the answer. Such motions are often allowed when the answer is not responsive to the question and contains prejudicial testimony of a fact concerning which the objecting party was not put on notice. But when the answer is directly responsive it will usually be permitted to stand unless in apt time objection was made to the question propounded. In *Dobson v. R. R.,* 132 N. C., 900, it is said: "A party may waive his right to the exclusion of incompetent testimony, ever so objectionable, if he fails to assert his right in due time; and so, when a witness is being examined in an improper manner, the objection to the character of the examination should be made known in apt time; otherwise the party prejudiced will be deemed to have waived it. A large part of the testimony of the witness Finch was incompetent because it was hearsay; but the defendant, so far as the record discloses, did not enter any objection in the manner required by law. Objection should be interposed when the incompetent questions are asked. It will not do to object after the question has been asked and answered. This would give the objector two chances, one to exclude the testimony if unfavorable to him and the other to make use of it if favorable; and for this reason the law requires that parties should act promptly or else the right to have testimony excluded, or the examination conducted within proper limits, will be waived." *Brown v. Hillsboro,* 185 N. C., 368, 373; *S. v. Stancill,* 178 N. C., 683. The admission of incompetent evidence without objection is assignable as error only when the evidence is made incompetent by statute. *Johnson v. Allen,* 100 N. C., 131. In any event, the evidence excepted to was cumulative. After Barkley had concluded, T. L. Starling testified on behalf of the plaintiff, without objection, to the identical fact mentioned by Barkley. In these circumstances the exceptions addressed to the admission of Barkley's testimony must be overruled. *Tilghman v. Hancock,* 196 N. C., 780; *Holeman v. Shipbuilding Co.,* 192 N. C., 236; *Gentry v. Utilities Co.,* 185 N. C., 285.

The defendant excepted to the following instruction: "There is no presumption of negligence in this case unless you find by the greater weight of the evidence that the plaintiff received an electric shock which injured him from this electric machine. If you find by the greater weight of the evidence that Bryant was injured by an electric shock, and that it was caused by that electric saw, then I charge you that that would make out a prima facie case of negligence against the defendant; the law would raise a presumption that it came from some negligence on the part of the defendant; that would not be conclusive presumption and would not shift the burden to the plaintiff, but nothing else appearing the jury would be justified in rendering a verdict against the defendant upon the issue of negligence. It simply means that there was a presumption raised and that the defendant can come forward with his evidence and explain away the presumption so as to destroy the presumption, if the jury finds from the evidence that it has done so."

The point of attack in this instruction is the asserted misapplication of the doctrine of *res ipsa loquitur*. This phrase, it will be noticed, was not used here; but the jury was told that a finding that the plaintiff had been injured by an electric shock caused by the electric saw would make a prima facie case against the defendant—that it would raise a presumption of the defendant's negligence. In close relation with this, his Honor gave the further instruction that to establish actionable negligence the plaintiff was required to show by the greater weight of the evidence that the defendant failed to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff, and that such negligent breach of duty was the proximate cause of the plaintiff's injury.

A presumption of fact is defined as an inference of the existence of one fact from the existence of some other fact, or an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known. Jones on Evidence, sec. 9; Starkie on Evidence, 742; *Home Ins. Co. v. Weide,* 11 Wallace, 438, 20 Law Ed., 197. A prima facie case is one in which the evidence in favor of the litigating party is sufficiently strong to call for an answer from his opponent. Black's Law Dictionary, 938; 31 Cyc., 1172; *Brock v. Ins. Co.,* 156 N. C., 112. In *White v. Hines,* 182 N. C., 275, 287, it is said: "A prima facie case or evidence is that which is received or continues until the contrary is shown. It is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. *Troy v. Evans,* 97 U. S., 3; *Kelly v. Johnson,* 6 Pet., U. S., 622; Jones on Evidence, sec. 8; *S. v. Floyd,* 35 N. C., 385; *S. v. Wilkerson, supra.* Even if the prima facie case be called a presumption of negligence, the presumption still is only evidence of negligence for the consideration of the jury. *Overcash v. Electric Co., supra; Shepard v. Telephone Co., supra; Mumpower v. R. R., supra.* In some of our decisions the expressions *res ipsa loquitur,* prima facie evidence, prima facie case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury. *Womble v. Grocery Co., supra; Stewart v. Carpet Co., supra; Ross v. Cotton Mills, supra; Shepard v. Telegraph Co., supra; Mumpower v. R. R., supra; Perry v. Mfg. Co.,* 176 N. C., 69."

When it is shown that an instrumentality which has caused personal injury was under the control of the defendant and the injury was such as does not happen in the ordinary course of things if due care is observed, the evidence should be submitted to the jury as tending to show that the injury resulted from the want of due care. It was upon this theory that the trial court gave the instruction to which exception was taken—an instruction which finds support in a number of our decisions. *O'Brien v. Parks Cramer Co.,* 196 N. C., 359; *Ramsey v. Power Co.,* 195 N. C., 788; *McAllister v. Pryor,* 187 N. C., 832; *Haynes v. Gas Co.,* 114 N. C., 204; *Houston v. Traction Co.,* 155 N. C., 4.

The exceptions in the fourth assignment of error, relating to the action of the judge in refusing to set aside the verdict and in signing the judgment, are formal and were intended to preserve the defendant's right to present the appeal in its entirety. We find

No error.

GEORGE W. BOYD AND HIS WIFE, BETTIE BOYD, v. F. H. BROOKS AND HIS WIFE, LELIA BROOKS.

(Filed 30 October, 1929.)

1. **Appeal and Error J k—Agreement to foreclosure is abandonment of appeal upon exceptions to decree therefor.**

   Where the plaintiff seeks injunction against the sale of a certain part of the lands under foreclosure of a mortgage, and appeals from the refusal of the court to continue the temporary restraining order to the final hearing, and then agrees that the foreclosure sale should not be restrained as to this part, his agreement is in effect a withdrawal of his appeal in relation to such lands, and he may not successfully prosecute it further in the Supreme Court.

2. **Appeal and Error J a—An appeal from the dissolution of a temporary restraining order will not be considered when the act sought to be restrained has been done.**

   An appeal involving only the validity of an order dissolving a temporary restraining order made upon a motion to show cause will not be considered on appeal to the Supreme Court when it appears that the act sought to be restrained has already been done.

3. **Home Site A a—Property constituting a "Home Site."**

   Where a mortgagor of lands at the time of the execution of the mortgage is in possession of a certain part thereof on which, with the usual outbuildings, he lives with his family as a home, such land is a "home site" within the meaning of C. S., 4103, and held in this case that a 54.75 acres of farm land is not excessive for the purpose.

4. **Same—Rights of parties under foreclosure of mortgage on "home site" in which the wife did not join.**

   Where the wife does not join in a mortgage made by her husband on the statutory "home site" in his lands, or have her privy examination taken as required by statute, the mortgagee takes subject to the provisions of C. S., 4103, and the purchaser at the foreclosure of such mortgage sale does not acquire under his deed the right to immediate title or possession to the land.

5. **Same—Deed to home site without joinder of wife is not void.**

   C. S., 4103, limits the effect of the conveyance of a "home site" by a husband's deed or mortgage made without the privy examination of the wife, but does not make the conveyance void, and the effect of the statute is to postpone the title and the right of possession of the "home site" under such deed until the death of the husband, when it then passes to the grantee subject only to the dower right of the wife if she survives him.

6. **Statutes A d—C. S., 4103 is not so vague, contradictory, and incapable of construction as to be void.**

   C. S., 4103, limiting the effect of a conveyance by the husband of the "home site" without the voluntary signature and assent of his wife signified by her private examination according to law, is valid, and does not fall within the principle that a statute too vaguely worded to express a definite meaning, and which is not susceptible of interpretation by the courts, will be declared void.

STACY, C. J., dissenting.

APPEAL by both plaintiffs and defendants from order of *Grady, J.,* at Chambers in Goldsboro, N. C., on 10 April, 1929. Plaintiffs' appeal dismissed. Affirmed on defendants' appeal.

This is an action to enjoin defendants from selling under the power of sale contained in a mortgage executed by the plaintiff, Geo. W. Boyd, to the defendant, F. H. Brooks, two certain tracts of land situate in Johnston County, North Carolina. The plaintiff, Bettie Boyd, wife of the said Geo. W. Boyd, did not sign said mortgage. Both said tracts of land are conveyed by said mortgage to the said F. H. Brooks.

The notes secured by said mortgage were executed by the said Geo. W. Boyd and are payable to the defendants.

The consideration for said notes is part of the purchase money for one of said tracts of land. This tract of land was conveyed to the said Geo. W. Boyd by the defendants, and contains 330 acres. It is conceded that the mortgage was valid as a conveyance of said tract of land, at the date of its execution, notwithstanding Bettie Boyd, wife of the said Geo. W. Boyd, did not sign the same. C. S., 4101.

At and prior to the date of said mortgage, the plaintiffs, Geo. W. Boyd and his wife, Bettie Boyd, occupied the other tract of land conveyed by said mortgage as their home. This tract of land contains 54.75 acres, and is owned by the plaintiff, Geo. W. Boyd. The residence which was occupied by the plaintiffs at and prior to the date of said mortgage, together with other buildings used in connection therewith, is located on this tract of land. After the execution of said mortgage, the plaintiffs moved from said tract of land to the tract of land which the said Geo. W. Boyd had purchased from the defendants, and thereafter occupied the same as their home. The 54.75-acre tract had not been allotted to the said Geo. W. Boyd as his homestead, in accordance with the provisions of the Constitution of this State. Plaintiffs allege, however, that said tract of land, at the date of said mortgage, was the "home site" of the said Geo. W. Boyd, as defined in C. S., 4103.

Upon the allegations of their complaint, plaintiffs pray judgment not only that defendants be enjoined permanently from selling, under the power of sale contained therein, the lands described in the mortgage from Geo. W. Boyd to F. H. Brooks, but also that the notes described in said mortgage be declared void, and ordered canceled, and that plaintiffs have such other and further relief, both specific and general, as they may be entitled to. Defendants in their answer denied the material allegations of the complaint, upon which plaintiffs pray judgment.

Plaintiffs prayed judgment that in any event it be ordered and decreed that no deed which may be made by the defendant, F. H. Brooks, under the power of sale contained in said mortgage, shall be effective to pass to the grantee the right to possession of or title to the tract of land containing 54.75 acres, during the lifetime of the plaintiff, Bettie Boyd.

The issues of fact arising on the pleadings have not been tried or determined.

The action was heard upon an order to show cause why a temporary restraining order procured herein by the plaintiffs should not be continued to the final hearing. Defendants resisted a continuance of said order, and moved that same be dissolved and vacated.

The court was of opinion, after hearing the evidence and the argument of counsel, that plaintiffs were not entitled to a continuance of the restraining order, and in accordance with said opinion the said restraining order was dissolved and vacated.

The court was further of the opinion, however, that upon the admissions in the pleadings, with respect to the 54.75-acre tract of land, conveyed thereby to the defendant, F. H. Brooks, the mortgage executed by the plaintiff, Geo. W. Boyd, without the voluntary signature and assent of the wife, Bettie Boyd, signified on her private examination according to law, by reason of the provisions of C. S., 4103, was not valid as a conveyance to pass possession of or title to said tract of land to the defendant, F. H. Brooks, during the lifetime of the said Bettie Boyd, and that no deed executed pursuant to the power of sale in said mortgage to a purchaser at a sale made thereunder will be effective to pass possession or title to such purchaser during the lifetime of the said Bettie Boyd, and in accordance with said opinion it was considered, ordered and decreed that no deed which may be executed by the said F. H. Brooks, under the power of sale in said mortgage, shall pass possession of or title to said tract of land to the grantee during the lifetime of said Bettie Boyd, and that such deed shall be of no effect whatever so long as the said Bettie Boyd shall live.

To the order, refusing to continue the temporary restraining order to the final hearing, and dissolving and vacating said order, plaintiffs excepted.

To the order adjudging and decreeing that no deed from F. H. Brooks to a purchaser at a sale made by him under the power of sale contained in the mortgage, shall be effective to pass possession of or title to the 54.75 acres during the lifetime of Bettie Boyd, wife of Geo. W. Boyd, and that such deed shall be of no effect whatever so long as Bettie Boyd shall live, defendants excepted.

Both plaintiffs and defendants appealed to the Supreme Court, each assigning error based on their respective exception.

After notices of appeal had been duly given by both plaintiffs and defendants, the following entry, over the signature of the judge, was made in the record:

"It is agreed that the 330 acres of the Cox Farm may be sold under this mortgage, and this appeal only has reference to the 54.75 acres."

Plaintiffs have not formally withdrawn or abandoned their appeal; they caused the same to be docketed in this Court. Their counsel filed a brief in their behalf and argued the appeal when the same was called for hearing in this Court.

Abell & Shepard and E. J. Wellons for plaintiffs.
Wellons & Wellons and Manning & Manning for defendants.

CONNOR, J. Plaintiffs' only assignment of error upon their appeal to this Court is founded on their exception to the order denying their motion that the temporary restraining order be continued to the final hearing, and allowing defendants' motion that said order be dissolved and vacated. The effect of this order was to relieve the defendants from the injunction imposed upon them by the temporary restraining order. Upon failure of plaintiffs to file the bond in the sum fixed by the court (C. S., 858(a), after they had given notice of their appeal to this Court, the defendants were as free to proceed with the sale of the lands described in the mortgage, under the power of sale contained therein, as they were before the temporary restraining order was signed.

Plaintiffs contended that there was error in the order, and appealed to this Court to the end that same might be reversed. Thereafter, and before the appeal was docketed in this Court, plaintiffs agreed that the 330-acre tract might be sold by the defendants under the power of sale in the mortgage, and that the only question to be presented to this Court was whether there was error in the order with respect to the 54.75 acres. Plaintiffs, therefore, agreed that defendants might do what the order to which plaintiffs excepted permitted them to do, with respect to the 330-acre tract. Whether or not there was error in the order as contended by plaintiffs, is now, by reason of plaintiffs' agreement, a moot question, which this Court will not consider.

The agreement was in effect a withdrawal by plaintiffs of their appeal, and an abandonment of their exception. Whether or not the agreement has any other or further effect than to withdraw plaintiffs' objection to a sale of the 330-acre tract by the defendants, prior to the trial of the issues raised by the pleadings, is not now presented for decision.

Plaintiffs' appeal must be dismissed. An appeal involving only the validity of an order dissolving a temporary restraining order, made upon an order to show cause, will not be considered by this Court when it appears that the act sought to be restrained has already been done, or that the appellant, after noting an exception to the order, has agreed that the act may be done. This Court will not reverse an order, although erroneously made, when appellant, notwithstanding his exception thereto, has subsequently agreed that the appellee may proceed in accordance with the order. *Kilpatrick v. Harvey,* 170 N. C., 668, 86 S. E., 596; *Moore v. Monument Co.,* 166 N. C., 211, 81 S. E., 170; *Yates v. Ins. Co.,* 166 N. C., 134, 81 S. E., 1062.

Defendants' appeal from the order made at the hearing of the order to show cause presents for decision but one question, to wit: Is C. S., 4103, constitutional and valid? The statute is as follows:

"No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings, together with the particular lot or tract of land upon which the residence is situate, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife, without the voluntary signature and assent of his wife, signified on her private examination according to law: *Provided,* the wife does not commit adultery, or has not and does not abandon the husband and live separate and apart from him."

It must be conceded, we think, that at the date of the execution of the mortgage by Geo. W. Boyd to F. H. Brooks, the 54.75-acre tract of land was a home site, within the statutory definition. It was a particular tract of land; it was owned by said Geo. W. Boyd; it was occupied by him and his wife as their home. The residence and other buildings used in connection therewith were located on said tract of land, and were included therein. There is no suggestion in the record that said tract of land was used or was susceptible of use for any purpose other than as a home. The acreage is not excessive for that purpose. Criticisms of the statutory definition, on the ground that it is vague and uncertain in some respects, and that for this reason it may be difficult to determine whether or not other tracts of land of larger acreage, and used by the owners for other purposes as well as a home, do not apply to this tract of land.

The mortgage conveying this tract of land, which was the "home site" of the owner within the statutory definition, was executed by said owner, without the voluntary signature and assent of his wife, signified on her private examination according to law. It was, therefore, not valid, under the provisions of the statute, to pass possession or title during the lifetime of the wife, and was without any effect whatever as to her so long as she shall live. Nor will a deed made under and pursuant to the power of sale contained in said mortgage be valid to pass such possession or title. There was no error in the order from which defendants have appealed unless it must be held that the statute is unconstitutional or void.

The statute was first enacted by the General Assembly of this State as chapter 123 of the Public Laws of North Carolina, session 1919. It was entitled "An act to protect the inchoate right of dower, and to prohibit the sale of the home by the husband, without the written assent of the wife." It was subsequently reënacted as a subsection of Article 2 (entitled "Dower") of chapter 80 (entitled "Widows"), of the Consolidated Statutes of North Carolina, 1919, and is now C. S., 4103. When the statute was first enacted, all laws and clauses of laws in conflict with its provisions, were expressly repealed. The statute became effective, according to its terms on the date of its ratification, to wit, 4 March, 1919. Notwithstanding the provisions of C. S., 4103, the husband may convey all his title to and estate in his land, in which his wife has an inchoate right of dower, without her joinder in his deed, provided the land conveyed is not a home site, as defined by the statute. C. S., 4101. His grantee in such deed, becomes the owner of the land, subject only to the wife's right of dower.

In *Johnson v. Leavitt,* 188 N. C., 682, 125 S. E., 490, *Stacy, J.,* with respect to this statute, says: "The homestead exemption should not be confused with the wife's interest in the husband's 'home site' (chapter 123, Public Laws 1919), when sought to be conveyed without her signature, which is also statutory." It is provided by the Constitution of this State that "no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of the wife, signified on her private examination according to law." Const. of N. C., Art. X, sec. 8. The homestead, as defined by the Constitution, is clearly distinguishable from the home site as defined by the statute. The homestead, which consists of a lot or tract of land, which with the buildings, if any, situate thereon does not exceed in value the sum of one thousand dollars, is exempt from sale under execution or other final process for the satisfaction of the claims of creditors. When the homestead has been allotted for the purpose of the exemption, it can be conveyed by the husband only with the joinder of the wife. The home site also consists of a lot or tract of land; the said lot or tract of land, with the residence and other buildings situate thereon must be used or susceptible of use by the owner as a home for himself and wife. The value of the lot or tract of land, with the residence and other buildings is immaterial. No conveyance by the husband of his home site without the joinder of the wife is valid as against her, so long as she shall live.

The statute prohibiting the conveyance of the home site by the husband, without the joinder of his wife, does not affect or purport to affect creditors of the husband, who may, notwithstanding its provisions, subject the home site, if not included within his allotted homestead, to sale under execution for the satisfaction of their claims.

At the death of the husband, the wife surviving him, she is entitled to her dower in the land which during their joint lives was the home site of the husband. The statute does not undertake to confer upon or vest in the wife any title to or estate in the home site of the husband, during their joint lives or at his death, either before or after its conveyance by the husband, without her joinder. During the life of the husband, the wife has only an inchoate right of dower in the home site; at his death, she surviving him, her right of dower becomes consummate. The conveyance by the husband, without her joinder, does not deprive her of her right of dower, either inchoate or consummate; nor does such conveyance confer upon or vest in her any title to or estate in the home site, during his life or at his death. She is entitled to her dower in the home site, after the conveyance, just as she was before the conveyance.

Upon the death of the husband, intestate, nothing else appearing, his statutory home site descends to his heirs, subject to the dower right of his widow. If the husband has conveyed his home site, with or without the joinder of his wife, the heirs acquire no title to or estate in the home site. If he has conveyed the home site with the proper joinder of his wife, his grantee is entitled to the immediate possession of the home site under his deed. If he has conveyed his home site, without such joinder, the grantee is not entitled to possession as against the husband, during the joint lives of the husband and wife; the wife, however, has no title to or right to possession of the home site during the life of the husband. At his death, she has only the right to have dower allotted to her in the home site. If the husband has conveyed his home site, without her joinder, his grantee, claiming under him, and not his heirs, who are barred by his deed, acquire both the title to and the right to possession of the land, which during the lifetime of the husband was his statutory home site.

In *Bank v. Sumner,* 188 N. C., 687, 125 S. E., 489, *Stacy, J.,* after reference to certain provisions of the statute, which make its interpretation difficult, says: "It has been suggested that the statute may apply, and probably was intended to apply, only as against those claiming under a deed from the husband without his wife's proper joinder. We leave its interpretation for future consideration." We think this suggestion well founded. The statute, properly interpreted and construed, does not apply to creditors or heirs of a husband, who is the owner of a statutory home site, and who has conveyed said home site, without the joinder of his wife. Nor does the statute affect the homestead, as defined, and provided by the Constitution.

The purpose of the statute, as appears from both its provisions and its title, is (1) to protect both the husband and the wife so long as the wife shall live, and the husband is under obligation, both legal and moral, to provide and maintain a home for them both, and (2) at the death of the husband, intestate, the wife surviving him, upon which event her inchoate right of dower becomes consummate, to protect her from controversies and litigation with respect to the allotment of her dower in the lands of which the husband was seized and possessed during the coverture, and which but for the statute he could have conveyed, passing title and possession by his deed, immediately upon its delivery, subject to her dower. That this purpose is in accord with the well-settled policy of this State to encourage the ownership of homes, and to safeguard the family as essential to the good order of society, is, we think manifest.

The statute does not deprive the husband who is the owner of a home site as defined therein, of his *jus disponendi* with respect to such home site. His right of alienation is recognized. This right is only limited and regulated by the provisions of the statute.

The statute limits the effect of a conveyance of his home site made by the husband, without the joinder of his wife, but does not declare such conveyance void. The right to the possession of the home site does not pass to the grantee immediately upon the execution of the deed; nor does the grantee acquire title under the deed upon its execution and delivery. Both the right to possession and the title are postponed until the death of the husband. The title conveyed by the deed, with the right of possession under such title, then passes to the grantee, subject only to the dower right of the wife, if she survives her husband.

The statute further regulates the manner in which the deed for a home site owned by the husband must be executed, where it is contemplated by both the husband and the grantee that possession and title shall pass immediately upon its execution. The wife must assent to and sign the deed voluntarily, which fact must be shown on her private examination according to law. A deed thus executed is sufficient as a conveyance of the statutory home site by the husband, and passes both the possession and the title upon its execution and delivery.

In *Thomas v. Sanderlin,* 173 N. C., 329, 91 S. E., 1028, *Hoke, J.,* says: "While the *jus disponendi* is fully recognized with us as a substantial incident of ownership coming under the constitutional guarantees for the protection of private property, it is also established in this jurisdiction that neither this nor any other proprietary right is absolute in its nature, but the same is enjoyed and held subject to legislative regulation in the reasonable exercise of the police power." Upon this principle, C. S., 2577, first enacted in 1891, and providing that "all conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other thing of value, are void, unless the wife joins therein and her privy examination is taken in the manner prescribed by law, in conveyances of real estate," was sustained. Upon the same principle, we hold that C. S., 4103, is constitutional. A distinction between C. S., 2577 and C. S., 4103, should be noted. In the former statute, the conveyance without the joinder of the wife is declared to be void; while in the latter statute, such conveyance is declared to be invalid only for certain purposes. The owner of household and kitchen furniture is deprived absolutely of the right to convey said property by mortgage, without the consent of his wife, whereas the owner of a home site is deprived of such right only to a limited extent. If the former statute is constitutional, as held by this Court, it seems that there can be no question as to the constitutionality of C. S., 4103.

C. S., 4103, is not unconstitutional for the reason that the statute is in violation of principles of constitutional law established for the protection of property rights. Nor is the statute void because its provisions are too vague and uncertain for administration. The principle upon which it was held by this Court that the statute involved in *Supply Co. v. Eastern Star Home,* 163 N. C., 513, 79 S. E., 964, was void, does not apply in this case. The provisions of C. S., 4103 are not contradictory or self-destructive, as was held of the provisions of that statute. There may and doubtless will be cases in which it will be difficult to interpret and construe the provisions of this statute in order to determine the rights of the parties. This does not, however, affect the question presented by defendants' appeal in this case. We now hold only that the statute is constitutional and valid and that upon the facts admitted in the pleadings with respect to the 54.75-acre tract of land, the said tract of land, at the date of the execution of the mortgage by Geo. W. Boyd, was his statutory home site, and that therefore there was no error in the order with respect to said tract of land.

The order from which defendants appealed to this Court is
Affirmed.

Stacy, C. J., dissenting: I regret to disagree with my brethren on a question of statutory construction, and would not do so, if the decision affected only the immediate parties or would not serve as a precedent in future cases, but after testing C. S., 4103, by all the known rules of interpretation, I am unable to determine, with any reasonable degree of certainty, its meaning or what the Legislature intended to accomplish by its enactment. *S. v. Diamond,* 202 Pac. (N. M.), 988, 20 A. L. R., 1527.

It is the declared law of this jurisdiction that "a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The Court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the Court is not at liberty to supply—to make one. The Court may not allow 'conjectural interpretation to usurp the place of judicial exposition.' There must be a competent and efficient expression of the legislative will." *S. v. Partlow,* 91 N. C., 550.

Speaking to the same question in *Drake v. Drake,* 15 N. C., 110, *Ruffin, C. J.,* delivering the opinion of the Court, said: "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

And such is the substance of the law as declared by the Supreme Court of the United States in *Yu Cong Eng v. Trinidad,* 271 U. S., 500; *Connally v. General Const. Co.,* 269 U. S., 385; *U. S. v. Cohen Grocery Co.,* 255 U. S., 81; *Collins v. Kentucky,* 234 U. S., 634, and *International Harvester Co. v. Kentucky,* 234 U. S., 216.

To like effect, also, is the law in other jurisdictions. *Wilkerson, District Judge,* in *Re. Di Torio,* 8 F. (2nd), 279, states the general rule as follows: "An act which is so uncertain that its meaning cannot be determined by any known rules of construction cannot be enforced. If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one. It must be capable of construction and an interpretation; otherwise it will be inoperative and void. An act is void where its language appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate," citing as authority for the position: *People v. Sweitzer,* 266 Ill., 459, 107 N. E., 902, Ann. Cas., 1916B, 586; *People v. Briggs,* 193 N. Y., 457, 86 N. E., 522; *S. v. Partlow,* 91 N. C., 550, 49 Am. Rep., 652; *S. v. West Side Street Ry. Co.,* 146 Mo., 155, 47 S. W., 959; 25 R. C. L., 811.

Nor is it necessary to look beyond the Court's own opinion in the instant case to demonstrate the ambiguity and uncertainty, and I think invalidity, of the statute.

It is said, in the first place, that the deed of the husband for the undetermined and undefined home site, without the voluntary signature and assent of his wife, is "not valid, under the provisions of the statute, to pass possession or title during the lifetime of the wife, and was without any effect as to her so long as she shall live."

Realizing, however, that the statute gives the wife no estate or interest in the home site as such, and that the possession and title thereto, when conveyed by the husband without the voluntary signature and assent of his wife, would, under the above statement, be *in nubibus* during her widowhood, it is said that "Both the right to possession and the title are postponed until the death of the husband. The title conveyed by the deed, with the right of possession under such title, then passes to the grantee, subject only to the dower right of the wife, if she survives her husband."

Again, it is stated that "at the death of the husband, intestate, the wife surviving him, upon which event her inchoate right of dower becomes consummate," the purpose of the statute is "to protect her from controversies and litigation with respect to the allotment of her dower in the lands of which the husband was seized and possessed during coverture, and which but for the statute he could have conveyed, passing title and possession by his deed, immediately upon its delivery, subject to her dower."

Thus, it is declared that the deed of the husband for the undetermined and undefined home site, without the voluntary signature and assent of his wife, is invalid to pass possession or title thereto:

1. During the lifetime of the wife or so long as she shall live.
2. Until the death of the husband.
3. Until the widow can have her dower allotted.

These three interpretations are all variant, and the question still remains: What is the real meaning of the statute? I am not criticising the Court's opinion. It is the result of an earnest effort to find a rational interpretation and to give clarity to cloudiness. A majority of the Court considers that this has been done; I think otherwise; and from this difference, springs our divergence of opinion.

Other objections to the workableness of the statute readily suggest themselves:

Is the statute self-executing, or must the home site be claimed, and, if so, by whom?

Who is to determine what the home site shall include, and what not? Is this a question of law for the court or a question of fact for a jury?

Was it intended to be in addition to, or included within, the homestead right?

Is it limited or unlimited in extent and value?

Having once conveyed the home site, without the wife's signature, could it later be taken under execution against the husband, or sold by the husband and the wife, and, if so, for what length of time?

Would a subsequent deed by the husband and wife defeat the husband's prior grantee of all rights in the premises?

What effect would a prior or subsequent separation or divorce have upon the deed executed by the husband without the wife's proper joinder?

On all these matters the statute is silent, and it would require considerable amendment, by way of judicial legislation, to answer them. But this is not the province of the Court. It is ours only to declare the law, not to make it. *Moore v. Jones,* 76 N. C., 187.

It is not possible to weld a pewter handle to a wooden spoon, and, in my opinion, the statute falls within the rule of law, stated in 25 R. C. L., 810, as follows:

"Where an act of the Legislature is so vague, indefinite and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the Legislature intended, or is so incomplete or is so conflicting and inconsistent in its provisions that it cannot be executed, it will be declared to be inoperative and void."

M. A. BUIE AND WIFE, MRS. M. A. BUIE, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 October, 1929.)

Appeal and Error J c—Findings of fact are presumed correct on appeal.

Where the finding of fact and conclusions of law of the referee are supported by competent evidence and approved by the trial judge, they are presumed correct on appeal, and upon failure of the appellant to show error the judgment will be affirmed.

APPEAL by plaintiff from *Cranmer, J.,* at Chambers, Southport, N. C., 6 July, 1929. From ROBESON. Affirmed.

The summons in this action was dated 16 December, 1920. The original complaint was filed in 1922. Answer filed 6 February, 1924. Amended complaint filed 7 April, 1926. Amended answer filed 11 June, 1926. October Term, 1926, the action was referred to the Hon. J. Bayard Clark, referee. The referee met the parties and their counsel at Red Springs 26 May, 1927, for the purpose of viewing the premises in controversy, and began taking testimony the same day in Lumberton. The final taking of testimony and hearing argument took place at Lumberton on 27 October, 1927. The referee in minute detail found the facts and gave his conclusions of law favorable to defendant. Plaintiff filed exceptions to the report on 10 June, 1929, and the matter was heard on 6 July, 1929. From the judgment of the court below sustaining the referee's finding of fact and conclusions of law, the plaintiff filed exceptions and made assignments of error and appealed to this Court.

Johnson & Floyd and Clyde A. Douglass for plaintiffs.
Dickson McLean and H. E. Stacy for defendants.

Per Curiam. The main contentions of the parties the Hon. J. Bayard Clark, referee, stated as follows:

"The controversy relates to a small triangular piece of land adjoining defendant's tracks in Red Springs. Plaintiffs allege their ownership in fee of the land and wrongful entry and trespass thereon by defendant; that defendant is estopped from claiming the right to occupy the land by reason of any charter rights because on 1 July, 1884, it took a deed from Hector McNeill for its roadbed proper adjacent to the land in controversy, thereby limiting its charter rights; that defendant has acquired no right to the land in controversy by purchase, condemnation, charter rights or otherwise, and its assertion of the right thereto is a cloud upon plaintiffs' title; that defendant has wrongfully entered and is unlawfully in possession; and plaintiffs ask that they be declared the owners in fee, that the cloud be removed, and that they recover damage. Defendant denies plaintiffs' ownership, and alleges that many years ago its predecessor in title entered into possession of the land in controversy for railroad purposes pursuant to certain charter rights, and that they and it have ever since been in actual possession, using the land for railroad purposes; that it is entitled to an easement of sufficient width on each side of its main line to include the land in controversy; that the land in controversy is necessary in conducting and carrying on both its inter and intra-State business as a common carrier; that any claim which plaintiffs may ever have had to the land in controversy or damages arising from its use is barred by the several statutes of limitations, which it pleads. Upon the hearing a controversy quickly developed as to whether conveyances offered by plaintiffs in proof of title do or do not cover the land in controversy, plaintiffs contending they do and defendants contending they do not."

A carefully prepared map showing the contentions of the litigants, in regard to the disputed *locus in quo,* was filed in the action.

The findings of fact and conclusions of law by the referee comprise fifteen pages of the record. We have carefully read the findings of fact and conclusions of law.

It is well settled in this jurisdiction that error will not be presumed; it must be affirmatively established. The appellant is required to show error, and he must make it appear plainly, as the presumption is against him.

From the findings of fact and conclusions of law by the referee, sustained by the court below, we cannot find any prejudicial or reversible error. The judgment is

Affirmed.

STATE v. DR. MIKE ROBERSON.

(Filed 6 November, 1929.)

Criminal Law G c—Where defendant does not offer character evidence, evidence of his bad character affects only his credibility.

Where a defendant in a criminal action testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence affects only his credibility as a witness, and an instruction that such evidence might be taken as substantive evidence of guilt will be held for reversible error.

APPEAL by defendant from *Sinclair, J.*, at February Term, 1929, of DURHAM. New trial.

Criminal action tried upon an indictment charging defendant with the crime of causing an abortion. C. S., 4226.

From judgment on a verdict of guilty, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. P. Reade and R. O. Everett for defendant.

CONNOR, J. The evidence offered by the State at the trial of this action tended to show that the crime charged in the indictment was committed by the defendant at his office in the city of Durham, on 1 June, 1928. Defendant, as a witness in his own behalf, testified that he was not in his office on that day. His testimony contradicted in every material respect the evidence for the State tending to show that defendant committed the crime. He offered no evidence as to his general character. He relied upon the testimony of his witnesses as tending to corroborate him as a witness in his own behalf.

The State, after defendant had testified as a witness, offered evidence tending to show that the general character of defendant is bad. Defendant offered no evidence to the contrary, either by his own witnesses or upon cross-examination of witnesses for the State. He contended that the jury should find him a credible witness because his testimony was corroborated.

With respect to the evidence as to the character of the defendant, the court instructed the jury as follows:

"Whenever character evidence is offered, however, upon the character of a defendant in a criminal action, the law says that that becomes substantive evidence—when his character is put in issue, as the defendant has done in this case. So character evidence offered for or against the defendant is substantive evidence, and it is proper for you to consider it as bearing upon the question of his guilt or innocence, upon the theory that a man of bad character would be more apt to commit crimes than a man of good character, or the contrary as the facts may be."

This instruction is not in accord with the well-settled rule with respect to this matter, established and in force in this jurisdiction. The rule is stated by *Brogden, J.*, in *S. v. Nance,* 195 N. C., 47, 141 S. E., 468, as follows:

"If a defendant testified in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence should affect only his credibility as a witness."

In *S. v. Colson,* 193 N. C., 236, 136 S. E., 730, it is said by *Stacy, C. J.*: "In all criminal prosecutions, certainly those involving moral turpitude, the defendant may elect to put his character in issue, and thus produce evidence of his good reputation and standing in the community *(S. v. Hice,* 117 N. C., 782); but if this be not done, the State cannot offer evidence of his bad character, unless and until he has been examined as a witness in his own behalf, and even then—the defendant not electing to put his character in issue—the impeaching testimony is permitted to affect only his credibility as a witness and not the question of his guilt or innocence. *Marcom v. Adams,* 122 N. C., 222; *S. v. Traylor,* 121 N. C., 674. Of course, in proper instances, in criminal cases, where the defendant chooses to put his character in issue, the pertinent evidence, pro and con, then becomes substantive proof, and may be considered by the jury as such. *S. v. Morse,* 171 N. C., 777; *S. v. Cloninger,* 149 N. C., 567; *In re McKay,* 183 N. C., 226."

The rule as thus declared has been uniformly enforced by this Court. *S. v. Nance,* 195 N. C., 47, 141 S. E., 468; *S. v. Idol,* 195 N. C., 497, 142 S. E., 588; *S. v. Adams,* 193 N. C., 581, 137 S. E., 657.

In each of the cited cases, new trials were ordered by this Court for error in the failure of the trial judge to observe this rule in his charge to the jury. The learned judge who presided at the trial of this action was evidently inadvertent, while instructing the jury, to the fact, as disclosed by the record, that defendant had offered no evidence as to his character, and therefore had not put his character in issue.

For the error in the instruction defendant is entitled to a
New trial.

ELBERT E. COLLINS BY HIS GENERAL GUARDIAN, ERNEST F. COLLINS, v. NORFLEET-BAGGS, INC.

(Filed 6 November, 1929.)

1. **Infants B c—Market value and not contract price of property traded may be recovered by infant upon his disaffirmance of contract.**

   Where in a contract for the purchase of an automobile an infant is allowed a certain sum for a truck traded in by him, upon disaffirmance of the contract by the infant during his minority and his suit, brought by his next friend, to recover the consideration paid by him, the contract is binding upon neither party thereto, and he is entitled to recover such sums as he has paid on the purchase price and the reasonable market value of the truck at the time of the trade, and if the truck is returned to him, the market value at the time of the trade should be fixed by assessing a reasonable amount for depreciation and use, if any, while in the possession of the defendant, and an instruction that fixes the value of the truck at the amount allowed therefor in the contract is reversible error.

2. **Infants B d—Liability of infant for tortious use or destruction of property received by him under contract he has disaffirmed.**

   Where an infant disaffirms his contract for the purchase of personal property during his minority he is not required by law to account for its use while in his possession or for its loss if squandered or destroyed by him before avoidance of the contract, but he is accountable for its tortious use or destruction after such avoidance and before its surrender.

APPEAL by defendant from *Moore, J.*, at February Term, 1929, of FORSYTH.

Civil action to recover the value of a Chevrolet truck and the sum of $40.95.

On 21 April, 1928, the plaintiff, being a minor, entered into a contract with the defendant, by the terms of which he traded a Chevrolet truck, valued at $250, for a Dodge sport roadster, valued at $659.50, and executed note and mortgage on the Dodge roadster for the balance of $409.50. On 21 May, 1928, the plaintiff made a payment of $40.95 on his note.

Thereafter the Dodge sport roadster was destroyed in a wreck; whereupon, the plaintiff elected to disaffirm his contract, and now sues to recover $290.95, being the sum of the value placed upon the Chevrolet truck at the time of the trade, to wit, $250, and the payment of $40.95, subsequently made on the note.

The trial court instructed the jury that if the plaintiff was a minor at the time of the trade, he would be entitled to recover $290.95, with interest from 22 September, 1928. Exception by defendant.

The jury found that the plaintiff was a minor, and answered the issue of indebtedness in accordance with the above instruction.

From the judgment entered thereon the defendant appeals, assigning errors.

Geo. R. Holton and W. Reade Johnson for plaintiff.
Ratcliff, Hudson & Ferrell for defendant.

STACY, C. J. When an infant elects to disaffirm a contract, relative to the sale or purchase of personal property, other than one authorized by statute or for necessaries, what are the rights of the parties?

1. An infant may avoid such a contract, either during his minority or upon arrival at full age. *Pippen v. Insurance Co.,* 130 N. C., 23, 40 S. E., 822.

2. Upon such avoidance, the infant may recover the consideration paid by him, either in money or property, with the limitation that he must restore whatever part of that which came to him under the contract he still has, or account for so much of its value as may have been invested in other property which he has in hand or owns and controls. *Hight v. Harris,* 188 N. C., 328, 124 S. E., 623; *Millsaps v. Estes,* 137 N. C., 536, 50 S. E., 227, 14 R. C. L., 238.

3. But the infant is not required to account for the use or depreciation of the property while in his possession, or for its loss, if squandered or destroyed, for this is the very improvidence against which the law seeks to protect him (*Utterstorm v. Kidder,* 124 Me., 10, 124 Atl., 725), with the exception, perhaps, that he might be required to account for any insurance money received by him, on the theory that such money was a substitute for the property destroyed. *Morris Plan Co. v. Palmer,* 185 N. C., 109, 116 S. E., 261; *Devries v. Summit,* 86 N. C., 132.

4. The infant, however, would be liable for any tortious use or disposition of the property after such avoidance and before its surrender to those from whom it was obtained. *Devries v. Summit, supra.*

5. Where the infant parts with personal property he may, upon disaffirmance, recover the value of such property, as of the date of the contract, but he is neither bound by, nor entitled to be awarded, the price fixed by the contract, for its real value may be more or less than the amount so stipulated. *Carpenter v. Grow,* 247 Mass., 133; *Beickler v. Guenther,* 121 Iowa, 419. Neither side is bound by any part of the contract, when once rescinded. *Morris Plan Co. v. Palmer, supra.*

In the instant case the plaintiff is entitled to recover the $40.95 which he paid on his note, together with the fair market value of the Chevrolet truck at the time of the trade. But he is not entitled, as a matter of law, to the sum of $250, the stipulated exchange value of said truck. In so instructing the jury, the trial court committed error. Its market value may be more or less than its stipulated exchange value.

If the Chevrolet truck is to be returned to the plaintiff, the jury will fix its value, as of the date of the contract, by assessing a reasonable amount for depreciation and use, if any, while in the possession of the defendant.

For the error, as indicated, in the court's instruction on the measure of damages, a new trial must be awarded; and it is so ordered.

New trial.

CHARLES R. REECE v. DURHAM COCA-COLA BOTTLING COMPANY.

(Filed 6 November, 1929.)

Food A a—In this action to recover damages for foreign substance in bottled drink plaintiff's evidence held insufficient.

In his action to recover damages resulting from foreign and deleterious substances in a bottled drink the burden is on the plaintiff to show the presence of foreign or deleterious substances therein, and where the plaintiff's evidence is to the effect that he swallowed something and spit, and that where he spit a fly was immediately found, but that he could not swear that the fly was ever in his mouth, with evidence of another witness that he had found a substance in a drink bottled by the defendant, but could not swear in what year he found it, the plaintiff's evidence is too vague and indefinite to establish the defendant's negligence, and his motion as of nonsuit should have been granted.

CIVIL ACTION, before *Sinclair, J.*, April Term, 1929, of GRANVILLE.

The plaintiff alleged "that on the morning of 8 July, 1926, plaintiff entered the store of said C. H. Breedlove in the town of Oxford, and purchased a bottled coca-cola, which had been bottled and distributed by the defendant; that while plaintiff was engaged in drinking said bottled coca-cola, and after he had drunk about all of the contents of said bottle he discovered something hard in his mouth; that he immediately spat out what was in his mouth, and upon examination discovered that it was a large green bottle fly, which had entered plaintiff's mouth with the other contents of said bottle." Plaintiff further alleged that by reason of the presence of said fly in the beverage he became sick and was unable to eat for several days.

Issues were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $50. The defendant offered no evidence.

From judgment upon the verdict defendant appealed.

No counsel for plaintiff.
Brawley & Gantt for defendant.

BROGDEN, J. Plaintiff testified: "I was talking with Mr. Lanier while I was drinking. I swallowed something and spit, but don't know what it was. It scratched like a piece of trash. As soon as that hit my throat I spit the balance on the floor. I knew I swallowed something, but I did not feel anything else in my mouth. I did not feel the fly in my mouth. I would not swear that it was ever in my mouth."

There was uncontradicted evidence that at the place on the floor where plaintiff spit a fly was immediately found. However, it is apparent that plaintiff's own narrative fails to disclose the actual presence of a fly in the beverage.

Plaintiff offered the testimony of a witness who stated that he discovered something in a bottle once or twice "while working in a filling station that sold beverage bottled by the defendant." Witness further testified: "I know almost that it was in 1926 that I found the substance in the bottle, but I do not know entirely, and I would not swear to it. . . . I would not swear that it was 1926 or 1927 when I found that substance in the bottle." . . .

This evidence was too vague and indefinite to establish negligent default.

The law imposed upon the plaintiff the burden of offering evidence tending to show the presence of foreign and deleterious substance in the beverage. The principle was thus stated in *Perry v. Bottling Co.,* 196 175, 145 S. E., 14. "It is settled law in this jurisdiction that the principle of *res ipsa loquitur* does not apply to personal injury occasioned by bursting bottles or from eating food alleged to be unwholesome, or for partaking of a bottled beverage when there is no evidence tending to show negligence in the preparation of the food or beverage and no deleterious or harmful substance is found therein." *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464.

We are of the opinion that the motion for nonsuit should have been allowed.

Reversed.

STATE v. U. W. ROBERTS.

(Filed 6 November, 1929.)

Husband and Wife A a—Wilfulness is essential of criminal abandonment.

Where the defendant is indicted under C. S., 4447, for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there is no presumption of wilfulness from the failure to provide adequate support, C. S., 4448, and an instruction that leaves out this essential element of the crime will be held for reversible error.

CRIMINAL ACTION, before *Sinclair, J.*, at March Term, 1929, of ORANGE.

The defendant was indicted for failure to provide adequate support for his children under C. S., 4447. The evidence tended to show that the defendant and his wife were not living together and he had not provided any support for his minor children since 1 January, 1928.

The evidence further tended to show that Lizzie Belle Roberts, wife of defendant, instituted a civil action against him for the purpose of obtaining alimony without divorce and for an allowance out of the property of the defendant for the support of the wife and the minor children of the marriage. Thereafter, at June Term, 1927, a consent judgment was signed, awarding all the personal property of defendant except his wearing apparel, farming tools, automobile, photographs of himself and members of his family, and half of the crop of 1926, to the wife. It is further recited in said judgment that the defendant, U. W. Roberts, had executed a deed to his daughter, conveying all of his real estate to said daughter for the benefit of his wife and children.

The defendant was convicted and sentenced to serve a term of twelve months on the roads.

From judgment pronounced defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Gattis & Gattis for defendant.

BROGDEN, J. The trial judge charged the jury as follows: "If you find from all the evidence beyond a reasonable doubt that—under these circumstances I have given you—that he has not provided adequate support during that time, taking in consideration his circumstances in life and his means, you will return a verdict of guilty; if you are not so satisfied, or if you have a reasonable doubt about it, you will return a verdict of not guilty."

The defendant excepted to the charge as given upon the ground that it omitted the essential element of wilfulness. The exception is sustained. *S. v. Yelverton,* 196 N. C., 64, 144 S. E., 534.

The State relies upon the presumption of wilfulness arising from the application of C. S., 4448. However, C. S., 4448, was construed in *S. v.*

Falkner, 182 N. C., 793, 108 S. E., 756. The opinion declares: "In this connection it may be well to observe that the next section, C. S., 4448, dealing with what shall be deemed presumptive evidence of a wilful abandonment, requires the showing of something more than a mere separation and failure to provide adequate support."

New trial.

W. A. SHOFFNER v. W. N. THOMPSON, ATLANTIC COAST REALTY COMPANY AND J. W. FERRELL.

(Filed 6 November, 1929.)

False Pretense A a—In this case held representations were not of subsisting fact and defendant was not liable therefor.

Where the owner of land employs agents to subdivide and sell it at public auction, and there is an existing registered deed of trust on the land of which the selling agents had knowledge, and at the sale the selling agents stated that "we guarantee a good, clear title and no encumbrance" to purchasers, the statement of the agents was not a representation that there was no encumbrance on the land, but a promissory statement that the lots would be conveyed to the purchasers with a covenant against encumbrances, and where the owner delivers to the purchasers such a deed, but fails to apply the proceeds of the sale received by him to the deed of trust, and the land is sold under foreclosure thereof, a purchaser at the auction sale may not recover against the selling agents on the representation made by them.

APPEAL by defendants, Atlantic Coast Realty Company and J. W. Ferrell, from *Sinclair, J.,* at April Term, 1929, of ALAMANCE. Reversed.

Action to recover damages resulting from the purchase by plaintiff of land from defendant, W. N. Thompson. The said land was sold for the said W. N. Thompson by the defendant, Atlantic Coast Realty Company, as his agent. The defendant, J. W. Ferrell, is an officer of the said Atlantic Coast Realty Company, a corporation.

After the plaintiff had paid the purchase price for said land, the same was sold under the power of sale contained in a deed of trust from W. N. Thompson to E. S. Parker, Jr., trustee. The said deed of trust was recorded prior to the date of the deed from W. N. Thompson to plaintiff. Plaintiff has thus lost the land which he purchased from the said W. N. Thompson and has suffered damages in the sum of $480, the purchase price which he paid for same.

Plaintiff alleged that he was induced to purchase said land from W. N. Thompson by false and fraudulent representations made to him by J. W. Ferrell, acting for and in behalf of the Atlantic Coast Realty Company, the agent of the defendant, W. N. Thompson. Plaintiff alleged that said representations were to the effect that there was no encumbrance on said land at the time it was sold to and purchased by plaintiff.

The defendants, Atlantic Coast Realty Company and J. W. Ferrell, denied that they made the representation as alleged in the complaint. They allege that in the sale of the said land to the plaintiff they acted as agent for the defendant, W. N. Thompson, as was well known to the plaintiff. They deny that they are liable to plaintiff for any damage he has sustained resulting from his purchase of said land.

The defendant, W. N. Thompson, filed no answer to the complaint. There was a judgment in favor of the plaintiff and against the defendant, W. N. Thompson, for damages resulting from a breach of his covenant against encumbrances contained in his deed to plaintiff. The defendant, W. N. Thompson, did not except to or appeal from said judgment.

The issues submitted to the jury were answered in accordance with the contentions of the plaintiff.

From judgment on the verdict the defendants appealed to the Supreme Court.

Carroll & Carroll for plaintiff.
Shuping & Hampton for defendants.

CONNOR, J. On 16 August, 1923, the defendant, Atlantic Coast Realty Company, a corporation, conducted a sale of land, at or near the town of Burlington, in Alamance County, North Carolina, for its codefendant, W. N. Thompson. The said land had been subdivided into lots for the purpose of said sale. The lots were offered for sale by auction. The plaintiff attended said sale as a prospective purchaser of lots.

Plaintiff testified that after the terms of the sale had been announced the defendant, J. W. Ferrell, acting for and in behalf of the defendant, Atlantic Coast Realty Company, stated to those present, including himself, that the lots were offered for sale for W. N. Thompson, as owner, and that the Atlantic Coast Realty Company was selling the lots as his agent. He then made the following statement: "We guarantee a good, clear title, and no encumbrances to any man or woman who buys a lot at this sale." After a few lots had been sold, there was some discussion among the prospective bidders for the other lots as to whether purchasers of lots at said sale would get a good title. The sale was stopped for a few moments. J. W. Ferrell then repeated his statement to the effect that "we guarantee a good, clear title and no encumbrance to any man or woman who buys a lot at this sale." The defendant, W. N. Thompson, was present when both these statements were made by his agent.

After the said statements were made, the plaintiff purchased several of the lots. The aggregate purchase price for said lots was $480. At the close of the sale, a deed executed by W. N. Thompson and his wife, and conveying to plaintiff the lots purchased by him was delivered to and accepted by plaintiff. This deed contains the usual warranty clause in words as follows: "And the said parties of the first part covenant that they are seized of said premises in fee, and have the right to convey the same in fee simple; that the same are free and clear from all encumbrances and that they, the parties of the first part, will warrant and defend the title to the same against the lawful claims of all persons whomsoever."

Part of the purchase price for the lots conveyed to plaintiff by W. N. Thompson and his wife was paid by him in cash; the balance was evidenced by his notes, secured by a mortgage on said lots. Plaintiff paid these notes as they became due. After the payment of the entire purchase price for said lots by the plaintiff, the said lots were sold by E. S. Parker, Jr., trustee, under the power of sale contained in a deed of trust executed by the said W. N. Thompson to the said E. S. Parker, Jr., trustee. This deed of trust was executed on 12 September, 1922, and was recorded prior to the date of the conveyance of the lots to the plaintiff. It is admitted that by the foreclosure of said deed of trust, plaintiff has lost the lots conveyed to him by W. N. Thompson and his wife, and that he has thereby sustained damages in the sum of $480.

At the date of the sale, at which plaintiff purchased the lots conveyed to him by W. N. Thompson and wife, the defendants, Atlantic Coast Realty Company and J. W. Ferrell, knew that the deed of trust executed by W. N. Thompson to E. S. Parker, Jr., trustee, and duly recorded in Alamance County, was outstanding and in full force. They were informed by W. N. Thompson that he had made arrangements with the holders of the notes secured by said deed of trust, and with the trustee, for the cancellation of the same. The proceeds of the sale made by the Atlantic Coast Realty Company for the said W. N. Thompson were sufficient in amount for the payment of said notes. These proceeds went into the possession of W. N. Thompson. He failed to pay the notes secured by the deed of trust to E. S. Parker, Jr., trustee, and on 18 October, 1927, the said deed of trust was foreclosed, and the land conveyed thereby, including the lots purchased by plaintiff, was conveyed by the trustee to James N. Williamson.

Upon the facts shown by all the evidence offered at the trial of this action—such evidence being viewed in the light most favorable to the plaintiff—there was error in the refusal of the motion of defendants for judgment as of nonsuit. For this error, the judgment must be reversed.

Conceding, for the purposes of this appeal, that the defendants would be liable for false and fraudulent representations made by them as agents of W. N. Thompson, by which plaintiff was induced to purchase lots at the sale, as alleged in the complaint, notwithstanding plaintiff knew that defendants were acting as agents of W. N. Thompson in making said representations, and said representations were made in the presence and with the knowledge of the said W. N. Thompson, the evidence fails to show that the statements made by J. W. Ferrell, acting for and in behalf of the Atlantic Coast Realty Company, were representations of a subsisting fact. Defendants did not represent to plaintiff that there was no encumbrance on the lots which they proposed to sell to him, and which plaintiff afterwards purchased; plaintiff's testimony shows only a promissory statement made by defendants which induced him to bid for lots offered for sale by defendants, as agents for the owner. Plaintiff paid for the lots upon the execution and delivery to him of the deed of W. N. Thompson and wife, containing their covenant against encumbrances. The damages sustained by plaintiff resulted from a breach of this covenant. For these damages plaintiff has recovered judgment against W. N. Thompson, from which the said Thompson has not appealed. It is not contended by plaintiff that the defendants are liable on the covenant.

In *Bank v. Yelverton,* 185 N. C., 314, 117 S. E., 299, it is said: "As a general rule fraud cannot be predicated upon promissory representations *(Pritchard v. Dailey,* 168 N. C., 330), because a promise to perform an act in the future is not in the legal sense a representation, but it may be predicated upon the nonperformance of a promise, when the promise is a device to accomplish a fraud. 12 R. C. L., 254, *et seq.*" When the evidence shows only a promise, which has been performed, there is nothing to support an inference that the promise was a device to accomplish a fraud. In the instant case, the defendants represented to plaintiff that if he purchased lots at the sale, which they were conducting as agents for the owner of the lots, the lots would be conveyed to him with a guaranty or covenant that there was no encumbrance on them. The deed tendered to plaintiff by the owner and accepted by him, contained a covenant against encumbrances. If W. N. Thompson, the owner of the lots, who was present when the statements were made by his agent, as testified by plaintiff, was not liable in this action for false and fraudulent representations, as held by the trial court, it is difficult to see how the agent can be liable. If the judgment which plaintiff has recovered in this action is not collectable because the judgment debtor is insolvent, that is the misfortune of the plaintiff. He has failed to show that appellants are liable to him for the damages which he has sustained by the breach of the covenant in his deed. The judgment against them is

Reversed.

STATE v. C. W. SNEED.

(Filed 6 November, 1929.)

Criminal Law D a—In this case held abandonment was in this State and State court has jurisdiction.

The constructive domicile of the wife is that of her husband, and where he has resided in another State and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. C. S., 4447.

APPEAL by defendant from *Barnhill, J.*, and a jury, at May Criminal Term, 1929, of DURHAM. No error.

This is a criminal action against the defendant for abandonment under C. S., 4447.

Mrs. C. W. Sneed testified in part: That she married the defendant 7 May, 1927, in DeLand, Florida; that her home had been in Daytona, Florida. She and her husband lived in Daytona until 11 July, 1927, and went to Atlanta, Ga. On 1 January, 1928, in Atlanta, Ga., there was born to the union a boy. About three weeks after the birth of their child her husband sent her back to Daytona, where she came from, until he could find work; that she lived there in "the small garage apartment of her mother's home." He was to go to Durham to find work and promised to send for her. She frequently heard from him while in Durham, but he did not send for her. She went to Durham on 8 June, 1928, as she had nowhere else to stay, and he was her husband and she thought her place was with him. She stayed in Durham five days at the Washington Duke Hotel, where he registered her, and saw her husband while there, and he paid her hotel bill, $15. He then took her and their child to Raleigh, and at the station in Raleigh he gave her $30 and sent her back. Said he didn't want to live with her any longer and sent her back; that he had not told any one he was married, and was out for a *"big time."* She came back to Durham about 14 September, but did not write she was coming. She went to the home of her husband in

West Durham with her grip, but the defendant refused to let her stay there. He had contributed nothing towards her support for a week before she swore out the warrant. He gave her $154 from January to June, and $100 from June to September. She received a card from him, mailed at Winchester, Va. The message on the card was *"Drunk again, still traveling, having a big time. Bill."* The card was sent to Daytona Beach. She was there with her child at the time. The last time defendant contributed anything to her support was 8 September, 1928. He had not contributed anything to her support or to the child's support since 8 September, 1928. She came to Durham after she received the last remittance. Defendant did not give her anything the last time she was in Durham. The trial in recorder's court was on 19 September. She was working at a salary of $15 a week. She had no other means of support for herself and child. At the time she was making $15 a week she had to employ a nurse to look after the child; she had to pay her $10 a week.

The defendant introduced no evidence.

The jury rendered a verdict of guilty. Judgment was rendered in the court below on the verdict and the defendant appealed to the Supreme Court, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

McLendon & Hedrick for defendant.

CLARKSON, J. The defendant assigns error:

The refusal of the court below to allow the defendant's motion of nonsuit upon the ground that if any offense was committed it was not committed in the State of North Carolina, and, therefore, not within the jurisdiction of this Court.

We do not think the assignment of error can be sustained.

The law pertinent, C. S., 4447, in part is as follows: "If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

There is no assignment of error to the charge of the court below. The major contention made by defendant was to the effect that if any offense was committed, it was not committed in the State of North Carolina; therefore, the court had no jurisdiction.

The court charged fully the elements of the crime that the State had to establish beyond a reasonable doubt before the defendant could be convicted.

"There are two elements of this offense—wilful abandonment and failure to support—and both must be alleged and proved. *S. v. Toney,* 162 N. C., 635; *S. v. May,* 132 N. C., 1021; *S. v. Smith,* 164 N. C., 476; *S. v. Hopkins,* 130 N. C., 647. Abandonment is not a continuing offense, day by day *(S. v. Hannon,* 168 N. C., 215), but the duty to support the wife is a continuing one during the existence of the marital union, and must be performed unless there is some legal excuse for nonperformance of it, and when defendant withdrew his support from his wife he became indictable under the statute, even though he lived in another State and had kept his promise and supported his wife for several years. His last delinquency must fix the beginning of his criminal liability." *S. v. Beam,* 181 N. C., 599; *S. v. Yelverton,* 196 N. C., 64.

It was contended by the State that the defendant wilfully abandoned his wife and child without providing adequate support in Durham, N. C. The defendant contended that if he did wilfully abandon his wife and child without providing adequate support that this took place in Georgia and he committed no offense in North Carolina. These contentions were fully set forth in the charge by the court below, and the court charged: "It is a question of fact for you to determine upon the evidence."

In 30 C. J., at page 511, part section 18, we find the following: "It is the husband's right to choose and establish the matrimonial domicile, and in general it is the duty of the wife to submit to the determination of the husband and to follow him to the domicile of his choice. On a change of domicile by the husband, it is the duty of the wife to follow him to the new domicile. The right of the husband to determine the domicile must be reasonable and not arbitrarily exercised. In exercising the right, the husband should have due regard for the comfort, health, welfare, safety and peace of mind of the wife." 13 R. C. L., at p. 989, sec. 9.

"Where a husband changes his residence from a consideration of convenience or business advantage it is, generally speaking, the duty of his wife to accompany him." *Monahan v. Auman,* 39 Pa. Super., 150, 153; 30 C. J., *supra.*

The record shows that the husband's domicile was in Durham. *In re Ellis,* 187 N. C., 840; *Gower v. Carter,* 194 N. C., 293, 195 N. C., 697. In *Hicks v. Skinner,* 71 N. C., at p. 543, it is said: "It must be held, however, that upon marriage the domicile of the wife by construction of law, became that of the husband."

Under the facts and circumstances of this case, we think that there was sufficient evidence to be submitted to the jury that the abandonment was wilful, and that there was a failure to provide adequate support, and both took place in Durham, N. C. We find

No error.

T. C. BOWIE v. H. C. TUCKER AND MARTHA TUCKER.

(Filed 6 November, 1929.)

1. **Judgments K b—Finding of meritorious defense necessary to setting aside judgment for excusable neglect.**

   Where the judge presiding at a term of the Superior Court corrects a judgment he has inadvertently signed dismissing the action, and in the absence of the defendant, enters a judgment sustaining a demurrer to the complaint and granting the parties additional time in which to file amended pleadings, and the plaintiff files an amended complaint, a copy of which the defendant fails to receive, and the clerk grants a judgment by default and inquiry thereon, C. S., 600, the action of the trial court at a succeeding term setting aside such judgment for excusable neglect without a finding of a meritorious defense will be reversed.

2. **Trespass B b—Action of trespass was alleged in this case.**

   Where an alley has been dedicated to the public and accepted by it, an allegation of the complaint in an action against an abutting owner that he has closed the alley with an obstruction and fastened the end on to the plaintiff's abutting property on the other side is one to the effect that the defendant has trespassed upon the property rights of the plaintiff and is sufficient to allege a good cause of action.

3. **Judgments L a—Judgment sustaining demurrer and granting time for filing amended pleadings does not estop plaintiff.**

   Where the trial court enters a judgment sustaining a demurrer to the complaint and therein grants the parties additional time to file amended pleadings in his plenary discretionary power, the order sustaining the demurrer, unappealed from, does not work an estoppel upon the plaintiff to proceed on the amended pleading.

APPEAL by plaintiff from *McElroy, J.*, at July Term, 1929, of ASHE.

The plaintiff brought suit to recover damages for wrongfully closing an alley dedicated to public use and wrongfully connecting fences of the defendants with a brick and concrete wall erected on the plaintiff's property.

Judge Clement sustained a demurrer to the complaint and said at the time that he would grant the plaintiff time to file an amended complaint and the defendants time to answer. The parties were then in court at a regular term. Judge Clement inadvertently signed a judgment dismissing the action. This judgment was not tendered to the plaintiff or his attorney. Upon discovering the mistake, without notice given to the defendants or their attorney he canceled the first judgment and rendered another in accordance with his announced purpose, sustaining the demurrer and allowing the plaintiff 40 days in which to file an amended complaint, and the defendants 40 days thereafter in which to answer. Within the time allowed him the plaintiff filed an amended complaint, a copy of which was given the clerk and by the clerk mailed to, but not received by, the defendants' attorney. The defendants filed no answer to the amended complaint, and on 4 March, 1929, the clerk signed a judgment by default and inquiry. The defendants appealed and Judge McElroy, upon facts found and set out in his judgment, adjudged that the defendants were entitled to have the judgment by default and inquiry set aside on the ground of excusable neglect and reversed the judgment of the clerk. To Judge McElroy's judgment plaintiff excepted and appealed therefrom to the Supreme Court.

C. W. Higgins for plaintiff.
W. R. Bauguess for defendants.

ADAMS, J. The clerk gave judgment by default and inquiry and the defendants made a motion before him to set aside the judgment on the ground of surprise and excusable neglect. The motion was denied, and upon appeal the clerk's judgment was reversed. C. S., 600. An applicant for relief under this section must show a meritorious defense, as well as excusable neglect. *Dunn v. Jones,* 195 N. C., 354; *Crye v. Stoltz,* 193 N. C., 802; *Helderman v. Mills Co.,* 192 N. C., 626. Conceding that there is sufficient evidence of excusable neglect to support the finding to this effect, we have discovered no evidence whatever, and of course there is no finding, of a meritorious defense.

The defendants contend that this principle is not applicable because the complaint does not state a cause of action. We do not concur in this conclusion. The allegations are that the brick wall is entirely on the property of the plaintiff; that between his property and that of the defendants there is an alley which has been dedicated to the public use; that it has been closed by the defendants; and in effect that the defendants have trespassed on the plaintiff's property by connecting their fences with his wall. In *Milliken v. Denny,* 135 N. C., 19, cited and relied on by the defendants, it was said, "We find no suggestion in the complaint that the alleged alley was dedicated to any public use"; and the absence of an allegation of dedication marks the difference between the complaint in that case and the one in the case before us. Where there is a dedication and acceptance of property to the use of the public the right of user at once arises and time is no longer material. *Tise v. Whitaker,* 146 N. C., 374. This is the substance of the amended complaint, which the plaintiff is entitled to establish by competent evidence, unless the defendants disconnect their fence from the plaintiff's wall and reopen the alley, the plaintiff alternately asking either this relief or damages for the alleged wrong.

The defendants finally advert to the principle that an unappealed judgment sustaining a demurrer to the merits of an action estops the plaintiff from further proceedings. If nothing more than a judgment sustaining the demurrer appeared in the present record the position would merit serious consideration. *Bank v. Dew,* 175 N. C., 79; *Swain v. Goodman,* 183 N. C., 531. But Judge Clement, during a regular term of the Superior Court, made an order in the exercise of his discretion granting the parties time in which to file additional pleadings. Pursuant to this order the plaintiff filed his amended complaint. The order sustaining the demurrer to the former complaint could not therefore work an estoppel upon the plaintiff to proceed on the amended pleading. That the judge had the power to make the order is unquestionable. *Goins v. Sargent,* 196 N. C., 478; *Hines v. Lucas,* 195 N. C., 376; *Aldridge v. Insurance Co.,* 194 N. C., 683. Indeed, permission to file amended pleadings after a demurrer is sustained, if the judge thinks the ends of justice will be thereby promoted, is suggested as the proper practice in *Milliken v. Denny, supra.*

The order setting aside the judgment by default and inquiry is

Reversed.

CHARLIE RHODES v. THE AMERICAN UPHOLSTERY COMPANY.

(Filed 6 November, 1929.)

Appeal and Error J e—Where plaintiff could not recover on any aspect of case he will not be awarded a new trial.

Where the plaintiff cannot recover in his action under any aspect of the evidence, error which may have been committed upon certain phases of the case will not be regarded as reversible, and a new trial will not be granted.

APPEAL from *MacRae, Special Judge* and a jury, at April Special Civil Term, 1929, of DAVIDSON. No error.

This is an action for actionable negligence, brought by plaintiff against defendant claiming injury to his left eye. The defendant denied negligence and set up plea of contributory negligence and assumption of risk.

The usual issues were submitted to the jury and the answer to the first one: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" was No.

Walser & Walser for plaintiff.
McCrary & DeLapp for defendant.

PER CURIAM. If there is error in the trial of this action in the court below, we think it harmless. From the evidence appearing in the record, we do not think it sufficient to have been submitted to the jury to sustain a recovery for actionable negligence.

If error should be found and a new trial granted, it would not profit plaintiff. If a new trial was awarded no different result could follow. The entire testimony relevant to the issues was before the court. From this evidence it is apparent that in no aspect of it could plaintiff recover. In such cases our decisions are to the effect that a new trial will not be granted. *Bateman v. Lumber Co.*, 154 N. C., 248; *Booth v. Hairston*, 193 N. C., 278. For the reasons given, there is

No error.

JOHN W. MARSHALL ET AL. v. TOWN OF KERNERSVILLE.

(Filed 6 November, 1929.)

Appeal and Error J a—Where allegations of complaint are not supported by evidence, judgment dissolving restraining order will be affirmed.

Where a temporary restraining order has been granted against an assessment against property by a town for street improvements upon the grounds of insufficiency of petition, and that the assessments were confiscatory, the plaintiffs being some of those assessed who had not paid: *Held*, the refusal of the trial judge to continue the injunction to the hearing will be sustained on appeal in the absence of satisfactory evidence to support the determinative allegations of the complaint.

APPEAL by plaintiffs from *Clement, J.*, at Chambers, 28 March, 1929. From FORSYTH.

Civil action to restrain the defendant from enforcing liens for street assessments.

The street improvement work in question was commenced in October, 1924, and completed in February, 1926. The assessment roll was confirmed 10 March, 1926. Many assessments were paid as they became due, but others were not. Whereupon, in December, 1928, the defendant advertised the delinquent properties for sale. Plaintiffs instituted this action 5 January, 1929, to enjoin the sales, alleging that the petitions for said proposed improvements did not, in all cases, contain the requisite number of names and amount of feet frontage; that said petitions, therefore, were insufficient; that the assessments, judgments and liens are confiscatory and void in that they attempt to lay a charge on private property without due process of law, etc.

It is further alleged, on information and belief, that there was lack of good faith, collusion and fraud on the part of the governing board of the defendant town in procuring the said petitions.

In the absence of satisfactory evidence to support the determinative allegations of the complaint, the temporary restraining order was dissolved and the action dismissed.

The plaintiffs appeal, assigning errors.

William Porter, J. E. Alexander and L. M. Butler for plaintiffs.
Morehead & Murdock for defendant.

PER CURIAM. No sufficient cause having been shown for disturbing the judgment, the same is

Affirmed.

GEORGE M. GLENN ET AL. v. E. E. CULBRETH ET AL.

(Filed 13 November, 1929.)

1. **Appeal and Error J a—Where act has been done an appeal from order dissolving temporary order will not be decided.**

Where a temporary order has been issued restraining the use of the registration for a primary election and upon a hearing the order has been dissolved upon proper finding of facts that the registration was regular, and the election has been held, an appeal from the order dissolving the temporary restraining order presents only moot questions, and will not be decided.

2. **Elections I a—Action to try title to public office is by quo warranto and not mandamus.**

Where the plaintiffs, residents of a city, institute an action praying that the use of the registration for a primary election be enjoined and that *mandamus* issue for a new registration, and a temporary restraining order issued therein has been dissolved, and the election has been held, an appeal from the dissolution of the temporary restraining order, if decided in favor of the appellants, would be in effect an action to try title to office, which cannot be done by *mandamus*, the proper remedy being *quo warranto.*

3. **Elections D c—Voters registered by third persons or failing to take oath not necessarily disqualified.**

Failure to administer an oath to voters applying for registration does not result in a forfeiture of their right to vote, nor does their registration by third persons necessarily work a disqualification.

4. **Elections I d—Where it is not shown that result of election would be affected the judgment of the trial court will be upheld.**

   Where there is no allegation or finding of fact by the trial judge that irregularities complained of in the registration of voters would have affected the result of an election, an appeal from his order dissolving a temporary order restraining the use of the registration will not be disturbed on appeal.

5. **Elections E c—Remedy for irregular registration was by challenge to voters and not mandamus for new registration in this case.**

   Where it is alleged that the registration of voters in a primary municipal election was irregular and fraudulent, and the plaintiffs seek *mandamus* to compel a proper registration, and the statute and the charter of the city under which the election is to be held provide for challenge to voters so registered: *Held, mandamus* being a proceeding in equity will not be issued, there being an adequate remedy at law by way of challenge provided by statute. C. S., 5972.

CIVIL ACTION, before *Midyette, J.*, at Chambers, in Raleigh, 12 April, 1929.

The plaintiffs, alleging that they were residents and voters of the city of Raleigh, instituted an action against the defendants, Commissioners of the City of Raleigh, and joined as defendants the registrars of said city. The plaintiffs alleged that a primary election was to be held in Raleigh on 22 April for the purpose of choosing commissioners for said city and a judge of the city court, said primary to be followed by the general election in the city, to be held on the first Monday of May, 1927.

The plaintiffs based their cause of action upon the following contentions:

(a) That the defendants, commissioners of the city of Raleigh, were candidates to succeed themselves and unlawfully attempted to select registrars favorable to their candidacy.

(b) That the defendants unlawfully and illegally printed certain blank cards containing space for the name of the voter and placed such cards in the hands of employees of the city to procure signatures to such cards which were then to be taken to the registrars and placed upon the registration books.

(c) That names of voters have been put upon the registration books unlawfully in all precincts.

(d) That the registrars were not sworn and qualified according to law.

(e) That the registrars have permitted third persons to place names on the registration books.

(f) That applicants for registration had not been sworn as required by law.

(g) That names of voters had been placed on the books by request over the telephone.

Upon such allegations plaintiffs prayed that the defendants and officers and employees of the city be restrained from using said registration and that a writ of mandamus issue.

A temporary injunction was issued and the cause was heard by Midyette, J., on 12 April.

The defendants filed answer, denying fraud or duress, and alleging that the primary was held in accordance with the charter of the city of Raleigh, same being chapter 59, Private Laws of 1913. Affidavits were filed by the parties, and after hearing the evidence the court rendered judgment, the pertinent portions of which are as follows: "This cause coming on to be heard before his Honor, G. E. Midyette, judge holding the courts of the Seventh Judicial District, by exchange, at Chambers in the city of Raleigh, N. C., on this 12 April, 1929, upon a hearing from the citation served upon the defendants in said cause, the same having been made returnable for 16 April, 1929, at 9:30 o'clock a.m.; but upon motion of the defendants the court, in its discretion, upon notice, having shortened the time for said hearing, and the cause having been reset for a hearing on 12 April, 1929, at 7:30 o'clock p.m., and the said hearing being heard upon the complaint, answer and affidavits filed herein, and upon the argument of counsel, and the plaintiffs by permission of the court, having subpœnaed each and every one of the defendant registrars then and there to appear and bring with them the registration books of the several precincts of the city of Raleigh in the hands of the several defendant registrars; and having heard the complaint, reply and the affidavits of the plaintiffs and the affidavits and answer of the defendants, and the court being of the opinion that the matters and things in controversy were largely ones of law, but found as a fact:

That the registration books for said primary election do not close until midnight 13 April, 1929, and that the registration books complained of are open for challenge against any voters whose names appear thereon that may not be properly or legally registered, and that such remedy is open to the complainants or any other interested persons; and it further appearing to the court that only one other day is now open for registration of voters, as provided in the charter of the city of Raleigh; and the court being of the opinion that it is not proper or necessary to continue the restraining order heretofore made against the defendants prohibiting them from the matters and things set out in the original order;

And it further appearing to the court, and it being found as a fact, that the defendant commissioners have regularly and properly called said election, and have forthwith duly appointed registrars and provided them with proper books for the registration of voters, and have properly advertised the said election and done all other things required of them by law; and the court being of the opinion that having done these things that the prayer of the complaint asking for mandamus to compel them to order a new registration and other things contained therein, are not proper or necessary in view of what has already been done; and the court being of the further opinion that to now interfere with the registration and election about to be held would be against the public interest, and would work great confusion in holding the election; and the court further being of the opinion that the plaintiffs have an adequate remedy at law:

It is therefore ordered, adjudged and decreed that the restraining order and injunction issued in the cause be, and the same is hereby dissolved, and the court further refuses and declines to grant the prayer for a mandamus to compel the commissioners of the city of Raleigh to provide for a new registration of the voters of said city."

From the foregoing judgment the plaintiffs appeal.

W. F. Evans for plaintiffs.
Clifton Beckwith and William B. Jones for defendants.

BROGDEN, J. The law provided for the regular city election on the first Monday in May, 1927. It was conceded in the oral argument that the election was held and the defendants, commissioners, were elected. The injury complained of has thus become accomplished and completed. Hence, the appeal presents, in its final analysis, only a moot or abstract question. The uniform rule adopted by this Court is to the general effect that such questions will not be considered. *Wikel v. Board of Commissioners,* 120 N. C., 451, 27 S. E., 117; *Pickler v. Board of Education,* 149 N. C., 221, 62 S. E., 902; *Little v. Lenoir,* 151 N. C., 415, 66 S. E., 337; *Wallace v. Wilkesboro,* 151 N. C., 614, 66 S. E., 657; *Moore v. Monument Co.,* 166 N. C., 211, 81 S. E., 170. Furthermore, if the registration is declared to be void, such ruling, under the circumstances of the case, would, in effect, be equivalent to an action to try title to office. This cannot be done by mandamus. *Ellison v. Raleigh,* 89 N. C., 125; *Markham v. Simpson,* 175 N. C., 135, 95 S. E., 106; *Johnston v. Board of Elections,* 172 N. C., 162, 90 S. E., 143.

There is no allegation or finding of fact by the trial judge as to the number of qualified voters or as to the number placed upon the registration books by means of the methods complained of; nor is there allegation or finding that persons so registered were not qualified voters of the city of Raleigh, and that the irregularities complained of would have affected the result of the election. *Hill v. Skinner,* 169 N. C., 405, 86 S. E., 351. The fact that a person was registered by a third person with whom the registrar had left the book does not necessarily work a disqualification *(Quinn v. Lattimore,* 120 N. C., 426, 26 S. E., 638); nor does a failure to administer an oath to voters applying for registration result in a forfeiture of the right to vote. This principle was declared in *Gibson v. Commissioners,* 163 N. C., 510, 79 S. E., 976, as follows: "A constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the State and that of the United States is directed to the registrars, and to them alone; and if they, through inadvertence, register a qualified voter, who is entitled to register and vote without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers."

The trial judge, after hearing the matter upon its merits, found as a fact that the election was properly called, registrars duly appointed, proper books for the registration of voters provided, and that the officers have "done all other things required of them by law." There was evidence to support this finding.

Moreover, the plaintiff had an adequate remedy at law. The charter of the city of Raleigh, Article VII, provides that every person who shall vote in the city primary "shall be subject to the challenge made by any resident of the city of Raleigh under such rules as may be prescribed by the board of commissioners, and such challenge shall be passed upon by the judges of elections and registrars," etc. The general election law provides the same remedy in C. S., 5972.

Upon the whole record, we are of the opinion that the judgment rendered must be upheld.

Affirmed.

W. R. PIERCE, RECEIVER OF THE CITIZENS BANK OF SHALLOTTE, v. E. F. MALLARD AND WIFE, BESSIE S. MALLARD, A. W. MALLARD, C. L. WILLIAMS, RECEIVER OF COMMERCIAL NATIONAL BANK, W. E. FUSSELL, C. LEACH, MATTHEW COBB, C. G. BEST, TRUSTEE, AND F. R. BRASWELL.

(Filed 13 November, 1929.)

1. Attachment E b—Notice of attachment on realty should be noted on judgment docket and indexed, and filing lis pendens is unnecessary.

C. S., 500 and 807 are to be construed *in pari materia,* and where notice of levy of attachment on defendant's land in a county has been given under the provisions of C. S., 807, by certification of the levy to the clerk of the court for that county and his notation thereof on his judgment docket and indexing in the index to judgments the effect is to take the land in *custodia legis,* and is not an action affecting the title to lands within the purview of C. S., 500, but from the day of such notice, unless the land is released, the attachment constitutes a lien superior to that of a judgment rendered in favor of another, and a later judgment in the attachment proceedings relates back to the filing and indexing of the attachment, and where such notice under C. S., 807, has been given, the filing of *lis pendens* in the same county under the provisions of C. S., 500, is unnecessary.

2. **Attachment C b—The trial court may allow minor amendments in attachment proceedings.**

In attachment proceedings it is within the discretionary power of the judge of the Superior Court to allow amendments in regard to minor defects.

APPEAL by defendant, C. L. Williams, receiver, from *Daniels, J.*, at August Term, 1929, of DUPLIN. Affirmed.

A jury trial having been waived by the parties in the court below, the judge found the facts and set them forth in detail:

Material facts. The Citizens Bank of Shallotte brought a civil action against E. F. Mallard, its cashier, in Brunswick County, and in said action caused a warrant of attachment to issue to the sheriff of Duplin County, where Mallard owned real estate. This warrant of attachment was received by the sheriff of Duplin County on 4 August, 1921, and he made a levy by virtue of the same on 18 August, 1921, on the lands of E. F. Mallard, described in Finding of Fact, and returned said warrant of attachment with his said levy and return to the Superior Court of Brunswick County. That in addition to making the said return to the Superior Court of Brunswick County the sheriff of Duplin County duly certified a copy of his levy and return to the clerk of the Superior Court of Duplin County. The said certificate of return and levy so made by the sheriff of Duplin County was duly docketed and filed in the office of the clerk of the Superior Court of Duplin County on 18 August, 1921, and recorded in Judgment Docket No. 10, at page 181, and duly indexed on the index to judgments in said office on said date. No notice of *lis pendens* in "Record of *Lis Pendens*" in Duplin County was ever filed by the plaintiffs, the Citizens Bank of Shallotte, in its action against E. F. Mallard, and being the action in which the warrant of attachment was issued, nor was any *lis pendens* ever docketed or cross-indexed in said action on the *Lis Pendens* Docket in the clerk's office of Duplin County.

The American Bank and Trust Company recovered judgment against E. F. Mallard in the sum of three thousand and ninety-one dollars ($3,091) in the Superior Court of Duplin County on 19 January, 1922, and the said judgment was duly docketed and indexed on said date in the Superior Court of Duplin County. And since the rendition of said judgment the defendant, C. L. Williams, as receiver, is now the owner of the said judgment. The Citizens Bank of Shallotte and W. F. Pierce, who was appointed receiver, were made parties to the action and recovered judgment against E. F. Mallard in the original action in which the warrant of attachment was issued at the October Term, 1923, of Brunswick Superior Court, a transcript of which judgment was duly docketed in the Superior Court of Duplin County on 15 October, 1923. The question is as to the priority of the liens of the respective judgments.

On the facts found the following judgment was rendered: "It is thereupon considered and adjudged, upon the foregoing findings of fact, that the lien of the judgment of W. F. Pierce, receiver of the Citizens Bank of Shallotte, against E. F. Mallard, for eighty-six thousand dollars, and interest, and costs, docketed on the Judgment Docket of the Superior Court of Duplin County, on 15 October, 1923, as hereinbefore set out, relates back to the date of the docketing of the return of the sheriff of Duplin County, on the warrant of attachment in the case of Citizens Bank of Shallotte *v.* E. F. Mallard, on the Judgment Docket of Duplin County, to wit, on 18 August, 1921, and that said judgment is a first lien on the tracts of land belonging to E. F. Mallard, set out and described in these findings of fact, and that the judgment of American Bank and Trust Company against E. F. Mallard, docketed on the Judgment Docket of the Superior Court of Duplin County, on 19 January, 1922, for the sum of three thousand ninety-one dollars, and interest on $3,000 from 19 January, 1922, and costs, and now owned by C. L. Williams, receiver of American National Bank, be and the same is hereby declared a second lien on the said lands of E. F. Mallard as hereinbefore set out, and subject to the lien of the judgment of the said W. F. Pierce, receiver, as aforesaid, and that the defendant, C. L. Williams, receiver, pay the costs of this action to be taxed by the clerk. F. A. Daniels, Judge."

To the judgment as signed C. L. Williams, receiver, excepted, assigned error and appealed to the Supreme Court.

McLean & Stacy and Gavin & Boney for W. F. Pierce, Receiver of the Citizens Bank of Shallotte.

J. O. Carr and Beasley & Stevens for C. L. Williams, Receiver of the Commercial National Bank.

CLARKSON, J. We think there was no substantial irregularity as would make the attachment void. It is well settled in this jurisdiction that for minor defects amendments can be made. *Askew v. Stevenson,* 61 N. C., 288; *Best v. Mortgage Co.,* 128 N. C., 351; *May v. Menzies,* 186 N. C., 144; *Thornburg v. Burton, ante,* 193; C. S., 547-9.

The main question involved in the controversy: Should the proceedings in attachment be docketed in the "Record of *Lis Pendens*" of Duplin County, C. S., 500, 501, 502, 503? We think not. It was docketed in the clerk's office of Duplin County in accordance with C. S., 807, in the judgment docket and indexed.

C. S., 500, says: "In an action affecting the title of real property, the plaintiff, at or any time after the time of filing the complaint, or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby."

This section must be construed with C. S., 807, which is under Attachment, *in pari materia.* A warrant of attachment is not an action "affecting the title to real property." The warrant of attachment is not an action, but is ancillary and auxiliary to the action. Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. C. S., 802.

The part of C. S., 807, material to be considered in attachments, provides: "He shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant an inventory of the property seized or levied on. . . . Where the sheriff or other officer levies an attachment upon real estate, he must certify the levy to the clerk of the Superior Court of the county where the land lies, with the names of the parties, and the clerk must note the same on his judgment docket and index it on the index to judgments, and the levy is a lien only from the date of entry by the clerk, except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made."

As said, the warrant of attachment is not an action affecting the title to the real property. The title of the owner of the land is not brought into dispute. The attachment merely seizes the property and holds it *custodia legis* until the final determination of the action or until the property is released pending the action when seized without proper cause. All the notice that any one is entitled to in cases where warrants of attachment are issued, is such as is contained in C. S., 807, *supra.*

The language with reference to warrant of attachment in C. S., 500, we must construe with C. S., 807. The latter requires the levy of a warrant of attachment on real estate to be certified to the clerk of the Superior Court of the county where the land lies, with names of parties, etc., the clerk notes same on the judgment docket. It is then indexed on the index to judgments and the levy then becomes a lien from the date of the entry by the clerk; except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made. It will be noted that in the Consolidated Statutes, under Civil Procedure, Art. 34, Attachment, this provisional remedy of attachment is a complete and orderly system to attach property and hold it until the final determination of the action. A full and complete method is provided to give the public notice when a levy on real estate is made. We do not think that C. S., 500, *et seq.,* made it incumbent to file also a notice of *lis pendens* in a docket kept in the same office of the clerk of the Superior Court in another book called "Record of *Lis Pendens.*" This record of *lis pendens* is known as the Buncombe County Law, made Statewide, Public Laws 1919, ch. 19. We think the method provided under attachment, C. S., 807, is all that is required to give notice to the public in attachment proceedings.

It will be noted that section 500, in the first part, speaks of warrant of attachment. The latter part says "If it is intended to affect real estate, may file with the clerk of each county in which the property is situated," etc. In warrants of attachment we find under C. S., 807, how this notice must be filed and what the clerk shall do to create a lien on the property attached—it must be noted on the judgment docket and indexed. In construing the two sections together, it was never intended that notice should be given under C. S., 807 and then under C. S., 500, *et seq.,* in "Record of *Lis Pendens,*" both records kept in the clerk's office. C. S., 500, was intended to apply to actions affecting title to real property, and the Statewide Buncombe County Law applied to those actions and required them to be docketed and indexed in a book called "Records of *Lis Pendens.*"

In *Horney v. Price,* 189 N. C., at p. 824, we said: "This *lis pendens* statute applies to 'an action affecting the title to real property.'" At page 825: "Title is the means whereby the owner of lands has the just possession of his property. Co. Litt., 345; 2 Bl. Com., 195; Black's Law Dic., p. 1157." The judgment below is

Affirmed.

STATE v. ARCHIE ALLEN.

(Filed 13 November, 1929.)

1. **Criminal Law G n—Sufficiency of circumstantial evidence to be submitted to the jury.**

   If in a criminal action there is any evidence tending to prove the fact in issue and which raises more than a suspicion or conjecture in regard to it, the same should be submitted to the jury, otherwise not.

2. **Homicide G a—Proof of motive not essential to State's case.**

   Where the evidence of the State is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree, motive for the killing is not an essential element of the State's case without which a conviction may not be had.

3. **Same—Evidence of defendant's guilt of murder held sufficient to be submitted to the jury.**

   Where the evidence in a trial for homicide tends to show that the prisoner and the deceased were seen talking together immediately before the latter was shot, and the deceased just after being shot said some one had shot him, but that he did not know who, and that the prisoner appeared in a neighboring house soon after the shooting, commented upon the fact that a man had been shot, and was anxious about having a pistol with him which he hid in consequence, and shells of the kind used in the pistol he had had and of the same size were found at the place of the killing, is upon the facts of this case held sufficient to be submitted to the jury and sustain a verdict of guilty of murder in the second degree.

4. **Criminal Law G a—Where the defendant introduces no evidence the question of guilt is for the jury under the presumption of innocence.**

   A defendant in a criminal action may rely upon the presumption of his innocence, which remains with him throughout the trial and introduce no evidence in his own behalf, and though this may have its moral effect on the minds of the jury, it does not of itself as a matter of law create a presumption against him, and the question of his guilt is for the determination of the jury under the evidence, with the burden upon the State to prove him guilty beyond a reasonable doubt. C. S., 1709.

APPEAL by defendant from *Sinclair, J.*, at March Term, 1929, of DURHAM.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one M. E. Rollins.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's prison at hard labor for a period of 30 years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Victor S. Bryant for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that M. E. Rollins, a white man and agent of the Home Security Insurance Company, was shot in the chest with a 25-calibre bullet and killed on the night of 18 March, 1929, while standing near his automobile on Division Street in the city of Durham. Only one shot was heard. Two or three minutes prior to the shooting, which occurred about 8 o'clock, the defendant and the deceased were seen standing in the street near the automobile, talking in a friendly manner about insurance, with no one else around. Immediately after the shooting, the deceased ran into a nearby house and said to an occupant, Mary Hinson: "Get the doctor quick and call my wife. I am shot. A fellow out there at my car shot me." On being asked by Mary Hinson if he knew who shot him, the deceased replied: "It was a fellow at my car, but I don't know who it was." Shortly thereafter the defendant was seen at the home of Fannie Batts on Oak Street several blocks from the scene of the homicide. According to Vanda Moore, he bgan to pace the floor back and forth, and said: "I wonder is that man dead?" and in reply to an inquiry as to what man he had reference to and whether anybody had been shot, he said: "Yes, somebody shot him." On hearing Connie Stone say that a man had been "shot up there," the defendant remarked: "Damn, I got this pistol in pawn. I wish, G—d— it, I had never got it," to which the witness replied, "Yes, Archie, if they catch you with it they will say you shot him." The defendant then said: "Damn it; let me hide it," and he went around the house and came back brushing off his hands. The next day a 25-calibre pistol was found under the house, which resembled the one the defendant had the night before. It had a bullet lodged in the barrel. Before leaving Fannie Batts' house that night, the defendant, on being informed that Mr. Rollins was dead, said that he could not go home because some policemen were out there and he did not want them to take him up, as he was already on a scout, and added: "If they don't get me tonight they won't get me." On the day after the shooting, an empty shell was found near the place where the car was parked, and about six days later another empty shell was found 35 or 40 steps away. Both of these shells were of the kind used in a 25-calibre pistol.

Upon this, the evidence chiefly pertinent, the State asked that the case be submitted to the jury, which was done, and resulted in a conviction of murder in the second degree. The defendant appeals, assigning as error the refusal of the court to dismiss the action as in case of nonsuit on the ground that the evidence is not sufficient to warrant a conviction, and he relies upon the following authorities to support his position: *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. Melton,* 187 N. C., 481, 122 S. E., 17 (concurring opinion); *S. v. Oakley,* 176 N. C.,

755, 97 S. E., 616; *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284; *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *S. v. Massey,* 86 N. C., 660; *S. v. Matthews,* 66 N. C., 106; *Rippey v. Miller,* 46 N. C., 479; 23 C. J., 49; 8 R. C. L., 225.

It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. *S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804; *S. v. White,* 89 N. C., 462. And it will readily be conceded that this is one of the border-line cases. But a careful perusal of the record leaves us with the impression that the State's evidence is of sufficient probative value to warrant its submission to the jury. *S. v. McKinnon, ante,* 576; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. McLeod,* 196 N. C., 542, 146 S. E., 409; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101.

The general rule of law is, that, if there be any evidence tending to prove the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise not. *Lewis v. Steamship Co.,* 132 N. C., 904, 44 S. E., 666; *S. v. Vinson,* 63 N. C., 335; *Matthis v. Matthis,* 48 N. C., 132. If the evidence warrant a reasonable inference of the fact in issue, its weight is for the jury. *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644.

Speaking to the subject in *Campbell v. Everhart,* 139 N. C., 502, 52 S. E., 201, *Walker, J.,* delivering the opinion of the Court, very pertinently says: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury."

The defendant offered no evidence, but relied upon the legal presumption of innocence and the weakness of the State's case. This he had a right to do. C. S., 1799. The presumption of innocence which surrounds a defendant on his plea of "not guilty," goes with him throughout the trial and is not overcome by his failure to testify in his own behalf. He is not required to show his innocence, but the burden is on the State to prove his guilt beyond a reasonable doubt. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846. And while his absence from the witness stand or his failure to testify, may be a circumstance not without its moral effect upon the jury, of which every lawyer appearing for a defendant is always conscious, yet this fact, as a matter of law, creates no presumption against him, and is not a proper subject for comment by the solicitor in arguing the case before the jury. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720.

Nor is the failure of the State to show motive necessarily fatal to the case. *S. v. Alderman,* 182 N. C., 917, 110 S. E., 59. Its existence, if and when shown, may be helpful to the prosecution, but it is not an essential element of the crime. *S. v. Adams,*.138 N. C., 688, 50 S. E., 765.

Applying these principles to the evidence in the instant case, we conclude that the same was properly submitted to the jury. The verdict and judgment will be upheld.

No error.

L. O. OGBURN v. DR. L. S. BOOKER.

(Filed 13 November, 1929.)

Judgments L b—Judgment in action in which defenses should have been set up will bar subsequent action thereon.

A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, C. S., 1476, 1477, and in the Superior Court the defendant is required to set up his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject-matter of the action.

CIVIL ACTION, before *Sinclair, J.,* at April Term, 1929, of DURHAM.

Plaintiff alleged that during the summer and fall of 1922 the defendant owned a tract of land on the Chapel Hill road, and that the plaintiff offered to buy three acres of said land fronting said highway, and that the defendant refused to sell three acres, but agreed to sell seven or eight acres at $500 an acre; that plaintiff was desirous of purchasing said land for the purpose of erecting a home thereon. Plaintiff further alleged that the defendant authorized him to go ahead and begin the construction of his home, and thereupon the plaintiff cleared a part of the land, drilled a well and built a garage; that subsequently, the defendant informed plaintiff that he would not sell less than fifteen acres of land, and that if plaintiff would complete his house at a cost of not less than $3,000 and take fifteen acres of land for $500 per acre, no initial payment would be required. Thereafter, on 17 October, 1922, the defendant and his wife executed and delivered to the plaintiff a deed for fifteen acres of land, and plaintiff executed and delivered to H. G. Hedrick, trustee for defendant, a deed of trust on the property described in the deed, which deed of trust secured the payment of the purchase-money notes. Thereupon the plaintiff began the work on his house and spent approximately $6,808.80.

Plaintiff further alleged that he did not have sufficient money to complete the house and offered to pay the defendant $1,000 if the defendant would release the front acre upon which the house was built, and that he secured a loan of $2,000 and offered the defendant $1,000 to release said front acre, but the defendant refused to do so. Plaintiff further alleged that when the purchase-money notes became due the defendant advertised the property and sold it on 7 December, 1923, at which sale the defendant became the purchaser of the property at the sum of $8,000.

Plaintiff further alleged that after the sale the defendant informed him that he must pay $50 per month "to keep up the taxes, insurance, interest," etc., but that if plaintiff would go ahead and make improvements on his home that he would hold the house for him and would not sell it to any one else. Plaintiff continued to occupy the house and pay the defendant the sum of $50 a month until about 23 March, 1925, but that the defendant "instead of helping the plaintiff to arrange to redeem his place . . . served notice upon the plaintiff to vacate the premises; that he brought suit to put the plaintiff out of his home."

Plaintiff further alleged "that on 20 April, 1925, the plaintiff was forced to vacate his home by order of court."

In consequence of the alleged wrongful conduct of defendant, plaintiff brought this suit on 25 October, 1926, to recover from the defendant the sum of $6,808.80 expended by plaintiff upon the house, and the further sum of $685 paid by plaintiff to defendant after the sale of the property.

The court entered judgment "from the pleadings filed in the cause that the defendant is entitled to a judgment against the plaintiff to the effect that the plaintiff take nothing by his suit, and that the defendant recover his costs in this behalf expended," etc.

From the foregoing judgment plaintiff appealed.

Bryant & Jones and Manning & Manning for plaintiff.
Long & Allen for defendant.

BROGDEN, J. The defendant contends that the judgment should be upheld upon the theory that it appears upon the face of the complaint that all oral negotiations between the parties prior to the execution and delivery of the deed and deed of trust were merged in those instruments. He further contends that the various oral agreements occurring after the registration of the deed and deed of trust, involved a contract to convey land, and hence were unenforceable by reason of the fact that the defendant had pleaded the statute of frauds. The latter contention of the defendant, however, is not available for the reason that the answer of the defendant is not in the record, and there is nothing to indicate to this Court that the statute of fraud was so pleaded.

Nevertheless, the plaintiff expressly alleges that the defendant brought suit against him and that he "was forced to vacate his home by order of court." It does not appear whether the judgment of eviction was rendered by a court of a justice of the peace or by the Superior Court in an ordinary action of ejectment. It is clear, however, that if the plaintiff was evicted by order of the court that we must assume, nothing else appearing, that the court had jurisdiction of the subject-matter and of the parties. If the judgment of eviction was rendered in a summary proceeding in ejectment, this could only be done upon the theory of the relationship of landlord and tenant, and if the plaintiff had set up the equities alleged in the present suit, the jurisdiction of the justice of the peace would have been at an end. C. S., 1476 and 1477. *McLaurin v. McIntyre,* 167 N. C., 350, 83 S. E., 627. On the other hand, if the plaintiff was evicted in an ordinary suit of ejectment in the Superior Court, it was his duty to plead the equities alleged in the case at bar. In either event the plaintiff, by his own allegations, has unequivocally demonstrated that he has taken no steps to protect his rights, if any, according to the orderly processes of the law.

Affirmed.

J. N. COE & COMPANY, INC., v. FIRST REALTY AND LOAN COMPANY.

(Filed 13 November, 1929.)

1. **Arbitration and Award E a—In this case held: instruction that award should not be considered by jury was erroneous.**

Where an award is set up in the defendant's answer in an action by the plaintiff to recover for materials furnished the defendant, and the award is attacked for being improperly, unlawfully and unfairly made, and the award was admitted in evidence without objection, a charge of the court to the jury that it could not consider the award is error to the defendant's prejudice, entitling him to a new trial.

2. **Trial E c—Conflicting instructions on a material phase of the case entitles party prejudiced thereby to a new trial.**

Where the trial court gives conflicting instructions upon a material phase of the case it cannot be assumed that the jury followed the correct part of the charge in answering the issue, and a new trial will be awarded on appeal.

APPEAL by defendant from *Moore, J.*, at March Term, 1929, of GUILFORD.

Civil action to recover for work and labor done and materials furnished in erecting buildings on lots in the city of Greensboro belonging to the defendant.

Upon denial of liability and plea of estoppel by arbitration and award, issues were submitted to the jury and answered as follows:

"1. Was the award set up in defendant's answer improperly, unlawfully and unfairly made? Answer: Yes.

2. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: Yes, $17,981.55, with interest until paid from 20 August, 1927.

3. Is the plaintiff indebted to the defendant, and if so, in what amount? Answer: Yes, $1,301.44, with interest from date of obligation until paid.

4. Did the plaintiff file its notice and claim of lien within six months from the furnishing of the last labor and material used in the construction of the buildings on the property referred to in the complaint, as therein alleged? Answer: Yes."

Judgment on the verdict, from which the defendant appeals, assigning errors.

A. C. Davis and Frazier & Frazier for plaintiff.

Hoyle & Harrison, J. S. Duncan, King, Sapp & King and Sidney S. Alderman for defendant.

STACY, C. J. The following excerpt, taken from the charge, constitutes one of the defendant's exceptive assignments of error:

"What that award is, as to the amount, gentlemen, is not before you, because it might be some evidence, or control or prejudice you in some way. As to the way they decided the matter isn't for you at all. You are to decide it under the instructions of the court, and from the evidence in the case."

The submission, which is the basis of every arbitration and award, being sufficient in the instant case, both in substance and in form, as well as the award made in pursuance thereof, and the latter having been offered in evidence without objection, we think it was error on the part of the trial court to withdraw the award from the consideration of the jury. *Mayberry v. Mayberry,* 121 N. C., 248, 28 S. E., 349; *Moore v. Gherkin,* 44 N. C., 73.

If an unquestioned arbitration and award be valid as an estoppel when properly pleaded and proved, it would seem to follow as a necessary corollary that it must be competent as evidence to establish such

defense. *Williams v. Mfg. Co.,* 154 N. C., 205, 70 S. E., 290, *S. c.,* 153 N. C., 7, 68 S. E., 902; *Geiger v. Caldwell,* 184 N. C., 387, 114 S. E., 497; *Hemphill v. Gaither,* 180 N. C., 604, 105 S. E., 183; 2 R. C. L., 388.

It is true that in other portions of the charge, the award is treated as properly being in evidence, but whether it was considered or discarded by the jury in answering the first issue, we are not able to say. Where there are conflicting instructions with respect to a material matter, a new trial will be granted, as the jury is not presumed to know which one of the two states the law correctly, and we cannot say that the erroneous instruction was not followed. *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756; *Edwards v. R. R.,* 132 N. C., 99, 43 S. E., 585.

There are other exceptions appearing in the record, worthy of consideration, but as the questions presented thereby are not likely to arise on another hearing, we shall not consider them now.

New trial.

STATE v. C. A. STRAUGHN.

(Filed 13 November, 1929.)

1. **Criminal Law L a—Appeal not prosecuted under Rules of Court will be docketed and dismissed on motion of Attorney-General.**

   An appeal from the conviction in a criminal case will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the Rules of Court, but the record will be examined for errors appearing upon its face, and where it so appears that the defendant was convicted without a trial by jury after he had entered a plea of "not guilty," the cause will be remanded to the Superior Court for trial according to law.

2. **Criminal Law I a—Prisoner may not waive his right to trial by jury when he has entered plea of not guilty.**

   Where the defendant in a criminal prosecution for a misdemeanor under the "Bad Check Law" has entered a plea of "not guilty," he may not waive his constitutional right to a trial by jury without changing his plea.

MOTION by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. At the February Special Term, 1929, of Robeson Superior Court, Hon. Cameron F. McRae, Special Judge presiding, upon the call of the present case for trial, wherein the defendant is charged with a violation of the "Bad Check Law," by consent of the solicitor and counsel representing the defendant, it was agreed that the court might "find the facts and the law," whereupon the court entered a finding "that the defendant is guilty," and rendered judgment that he "pay a fine of $50 and costs." The defendant gave notice of appeal to the Supreme Court, but has failed to prosecute same as required by the rules. *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728.

The motion of the Attorney-General to docket the appeal must be allowed. *S. v. Clyburn,* 195 N. C., 618, 143 S. E., 129; *S. v. Thomas,* 195 N. C., 458, 142 S. E., 474; *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881; *S. v. Ward,* 180 N. C., 693, 104 S. E., 531. But as it appears on the face of the record proper that the same error was committed in this case as in *S. v. Crawford, ante,* 513, the judgment will be stricken out and the cause remanded to the Superior Court for trial by a jury as the law provides; none has yet been had.

It has been held in a number of cases that when a defendant in a criminal prosecution, on trial in the Superior Court, enters a plea of "not guilty" to the charge preferred against him, he may not thereafter, without changing his plea, waive his constitutional right of trial by jury. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629. And this applies to misdemeanors as well as to the more serious offenses. *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394.

Of course, special verdicts are permissible in criminal cases, but when such procedure is had, all the essential facts must be found by a jury. *S. v. Allen,* 166 N. C., 265, 80 S. E., 1075. They may not be referred to the judge for decision even with the consent of the accused or his counsel. *S. v. Holt,* 90 N. C., 749.

Error.

J. H. COLE AND ATLANTIC BANK AND TRUST COMPANY, J. H. COLE, AUGUST KLIPSTEIN, JR., AND NELL FERGUSON, TRUSTEES, v. HARRIS MANGUM WAGNER AND HIS GUARDIAN, MRS. FRANCES C. WAGNER.

(Filed 13 November, 1929.)

1. **Pleadings D a—Upon demurrer on grounds that cause of action is not stated pleadings will be liberally construed.**

Where the defendant's motion for judgment upon the pleadings and that the action be dismissed is in the nature of a demurrer *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action, C. S., 511(6), the pleadings will be liberally construed with a view to substantial justice between the parties. C. S., 535.

2. **Same—In this case held: cause of action was sufficiently alleged.**

Where in an action by the trustees of a hospital against a minor and his guardian it is alleged that the hospital gave the infant medical attention necessary to save his life and usefulness after his injury in an accident, and that the guardian of the infant had recovered judgment for the negligent injury, and that hospital and medical attention was a substantial part of the consideration of the judgment recovered by the guardian of the infant: *Held*, the allegations are not so vague and uncertain as to fail to state a cause of action, but allege a cause of action upon *quantum meruit* and for money had and received, and the defendants should have asked, if they desired the complaint to be made more definite, for a bill of particulars, C. S., 534, or move that the plaintiff be required to amend. C. S., 537.

3. **Pleadings D d—Demurrer on ground that cause of action is not stated may be taken at any time.**

A motion which is in effect to the sufficiency of the complaint to allege a cause of action, or in the nature of a demurrer *ore tenus* may be taken at any time, or the Supreme Court may take knowledge thereof on appeal on its own motion.

4. **Infants B a—In this case held: hospital might recover for services upon quantum meruit as necessaries.**

A father who furnishes to his infant child a living under his own roof is not ordinarily liable to a stranger for furnishing his infant child such service as the parent may not reasonably consider necessary, yet where the child has met with a serious accident rendering it necessary for him to receive treatment at a hospital in order to save his life and usefulness, the hospital may recover upon a *quantum meruit.*

5. **Same—In this case held: hospital could recover against minor's guardian for necessary medical attention.**

Where in an action by the owners of a hospital to recover against a guardian of an infant it is alleged that the infant has recovered damages in an action against another for a negligent injury and that a part of the consideration recovered in the judgment was for hospital services rendered by the plaintiff in consequence of such injury: *Held*, the moneys recovered on account of the hospital treatment, etc., are necessaries and the plaintiff is entitled to recover from the guardian the amount so paid as moneys had and received by the infant to the use of the plaintiff as upon a *quantum meruit.*

6. **Money Received A a—Where judgment recovered for a negligent injury includes hospital expenses, hospital may recover for money received.**

Where an infant by his next friend has recovered judgment against another for a negligent personal injury, and included therein is the hospital expenses incident to the injury, and the judgment has been paid, the hospital may recover upon *quantum meruit* the amount of money so adjudicated for its services as for money had and received to its use.

7. **Infants C a—Defense of infancy must be pleaded.**

The defense of infancy of the defendant in a civil action must be set up in the answer, or it will be considered as waived.

8. **Infants B a—Infant's contract is voidable and not void.**

The contracts of an infant are voidable and not void.

9. **Quasi Contracts B b—Question of reasonable worth of services rendered is for the jury.**

Where in an action upon *quantum meruit* the defense is interposed by the infant defendant that the amount sought to be recovered as necessary hospital expenses was excessive and exorbitant; the question is for the jury, the trial court having the power to set aside the verdict if excessive.

APPEAL by plaintiffs from *Moore, J.*, at August Term, 1929, of GUILFORD. Reversed.

This is an action brought by plaintiffs against the defendants to recover the sum of $2,534.50 and interest from 13 March, 1928.

The plaintiffs are the owners of the "Wesley Long Hospital" in Greensboro, N. C. The defendant, Harris Mangum Wagner, is a minor about 12 years of age; his mother, the defendant, Mrs. Frances C. Wagner, was appointed guardian after the time her son received the attention hereinafter mentioned in the "Wesley Long Hospital."

Plaintiffs in their complaint allege: That about 27 August, 1926, Harris Mangum Wagner was seriously injured, and in order to save his life and usefulness that it became necessary that he receive hospital, medical and surgical attention, and he became an inmate of the said hospital and received such attention between said date above mentioned and 13 March, 1928, and the reasonable value of said attention was $2,534.50. An itemized statement showing what the amount was for is attached to the complaint. That at March Term, 1928, the said Harris Mangum Wagner recovered judgment in the Superior Court of Lee County in the sum of $4,500 as damages for the said injury for which the before-mentioned treatment was rendered. That said judgment has been paid to defendant guardian; that said hospital, medical and surgical treatment rendered by the plaintiffs was a material and substantial portion of the consideration for the rendition and payment of said judgment; that Frances C. Wagner is the duly qualified and acting guardian of Harris Mangum Wagner, and as such guardian has or is entitled to the $4,500 damages in payment of the judgment for the personal injury to the said Harris Mangum Wagner.

The defendants in their answer admit most of the material allegations of the complaint, but allege that when Harris Mangum Wagner was admitted to the hospital, he was living with his parents. That the son was treated at the hospital at the request of the company through whose negligence he was injured. Plea of infancy is set up, and, in regard to the bill rendered, says: "The defendant, Frances C. Wagner, . . .

does not consider the bills rendered in this case reasonable, but on the contrary they are exorbitant and excessive."

The court below found "at the time of the matters and things set out in the complaint (Harris Mangum Wagner) was then and now is living with his father, who was and now is supporting him." This was admitted by plaintiffs.

The defendant moved for judgment upon the pleadings and that the action be dismissed. The court below granted the motion, and the plaintiffs excepted, assigned error and appealed to the Supreme Court.

K. R. Hoyle and Hoyle & Harrison for plaintiffs.
King, Sapp & King and Gavin & Teague for defendants.

CLARKSON, J. The defendants' motion was in the nature of a demurrer *ore tenus* on the ground that "The complaint does not state facts sufficient to constitute a cause of action." C. S., 511 (6). The complaint must be liberally construed "with a view to substantial justice between the parties." C. S., 535. *Lee v. Produce Co., post,* 714.

"An objection that a complaint does not state a cause of action may be taken advantage of at any time. In such case the defendant may demur *ore tenus* or the Supreme Court of its own motion may take notice of the insufficiency. *Johnson v. Finch,* 93 N. C., 205; *Garrison v. Williams,* 150 N. C., 674; *McDonald v. MacArthur,* 154 N. C., 122." *Lassiter v. Adams,* 196 N. C., at p. 712.

We lay down certain principles of law and equity that are applicable to the facts set forth in the complaint and appear of record.

"As the general rule applicable to contracts is that the infant is not liable thereon, so the general rule in the law of torts is that he is liable." 14 R. C. L., part sec. 36, p. 259; *Smith v. Kron,* 96 N. C., 392; *Morris Plan Co. v. Palmer,* 185 N. C., 109; *Hight v. Harris,* 188 N. C., 328; *Collins v. Norfleet-Baggs, ante,* 659. To the general rule that an infant is not liable on contract is the well recognized exception that he is liable for necessaries. The serious question often arises, what are necessaries?

"Medical and dental services reasonably required by the infant are usually classed necessaries." 14 R. C. L., p. 256.

In *Freeman v. Bridger,* 49 N. C., at p. 2, *Pearson, J.,* speaking to the subject: "Lord Coke says, Co. Lit., 172a, 'It is agreed by all the books, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and such *other* necessaries.' These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling and nursing (as well as physic) while sick. In regard to the quality of the clothes and the kind of food, etc., a restriction is added, that it must appear that the articles were suitable to the infant's degree and estate." *Richardson v. Strong,* 35 N. C., 106; *Hyman v. Cain,* 48 N. C., 111; *Jordan v. Coffield,* 70 N. C., 110; *Turner v. Gaither,* 83 N. C., 357; 14 R. C. L., p. 256; Elliott on Contracts, Vol. 1, sec. 297-298.

It is also said in the *Freeman case, supra,* at p. 4: "While an infant lives with a parent, he cannot bind himself even for necessaries, unless it be proved that the parent was unable or unwilling to furnish the child with such clothes, etc., as the parent considers necessary, 'for no man shall take upon himself to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom.' *Bainbridge v. Pickering,* 2 Blackstone's Rep., 1325. 'Guardians for infants are presumed to furnish all necessaries, and a stranger who furnishes board, or anything else, must, except under peculiar circumstances, take care to contract with the guardian.' *S. v. Cook,* 12 Ire. Rep., 67." See *Thayer v. Thayer,* 189 N. C., 502, 39 A. L. R., 428.

The next serious question is that ordinarily the father is liable for the necessaries of his infant child. In *Smith v. Young,* 19 N. C., at p. 27, it is said: "The law is, if an infant is living under the roof of his parent, who provides everything which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might, under other circumstances, be deemed necessaries. . . . But here the defendant did not live under the roof of his parent, but lived apart from him, laboring and receiving the profits of his labor to his own use. He was *pro tempore* acting as his own man, by the assent of his father; and the articles received by him being necessaries, should be paid for by him." As to the liability of lunatics on contracts, see *Wadford v. Gillette,* 193 N. C., 413; *Bank v. Duke,* 187 N. C., 386.

In 31 C. J., part sec. 174, at p. 1077, the law is stated: "As a rule the parent is liable for the support of his child, and the guardian for the support of his ward. Consequently, an infant who has a parent or guardian, or one who stands in *loco parentis,* who provides him with everything that appears to be necessary and proper, cannot bind himself to a stranger even for necessaries. Where the parent has the ability and is willing to support his minor child, board, lodging, etc., furnished to such infant by another without the parent's consent are not necessaries for which the infant is liable. But the mere fact that an infant has a father, mother, or guardian does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything toward his care or support."

The next serious question is when money is received that in equity and good conscience belongs to another.

In 41 C. J., p. 33, sec. 9, it is said: "The question, in an action for money had and received, is to which party does the money, in equity, justice, and law, belong? All plaintiff need show is that defendant holds money which, in equity and good conscience, belongs to him, but if he fails to show such superior right, that is that defendant does hold money which belongs to plaintiff, he cannot recover." Sec. 14: "Where one person has received money as an indemnity in which another has the right to share, the latter may maintain an action for money had and received for his portion." Sec. 18: "Although it is held that to support an action for money had and received there must be some privity between the parties in relation to the money sought to be recovered, the preponderance of authority is to the effect that no further privity is required than that which results from one person's having another's money, which he has no right conscientiously to keep, as in such cases the law implies a promise that he will pay it over." Sec. 34: "It is immaterial how the money may have come into defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity, and good conscience, he is not entitled to hold it against the true owner."

2 Elliott on Contracts, p. 623-4, sec. 1375, in part, thus states the principle: "The action can be maintained only to recover either money or the equivalent of money. In order to maintain an action for money had and received it is necessary to establish that defendants have received money belonging to the plaintiff or to which he is in equity and good conscience entitled.

"The rule is quite elementary that, to enable a person to maintain an action for money had and received, it is necessary for him to establish that the persons sought to be charged have received money belonging to him or to which he is entitled. That is the fundamental fact upon which the right of action depends. *Trust Co. v. Gleason,* 77 N. Y., 400. The purpose of such action is not to recover damages, but to make the party disgorge; and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." Elliott, *supra,* note p. 1375; *Springfield First Nat. Bank v. Gratton,* 172 Ill., 625; *Porter v. Roseman,* 165 Ind., 255; *Bahnsen v. Clemmons,* 79 N. C., 556; *Houser v. McGinnas,* 108 N. C., 631.

The case of *Richardson v. Strong,* reported in the 35 N. C., 106, is an interesting one. The defendant became insane and so much so that he attempted to injure himself and destroy his property. His relatives and physician thought it necessary that he have a white man as a nurse and to guard him against violence. Plaintiff was requested by a member of the family to attend on him. He did so. The defendant recovered from his mental sickness and refused to pay plaintiff, who brought suit to recover for his services. The defendant pleaded insanity, and that no promise could be implied. *Ruffin, C. J.,* speaking for the Court, said: "There is, therefore, no absurdity in the case of lunatics, more than in that of infants, in implying a request to one rendering necessary services, or supplying necessary articles, and implying, also, a promise to pay for them." The plaintiff was allowed to recover on a *quantum meruit.*

In the present action the complaint alleges that Harris Mangum Wagner was seriously injured, and in order to save his life and usefulness it became necessary that he receive hospital, medical and surgical attention and became an inmate in the "Wesley Long Hospital," and was treated there from 7 August, 1926, to 13 March, 1928. It appears that at the time he was seriously injured he was living with his father, who was and is now supporting him in the usual manner. From the facts alleged in the complaint, we do not think that the fact in regard to his father's usual support can absolve the infant from liability, under the facts and circumstances of this case. The infant was seriously injured, and by fair inference was immediately taken to the hospital and his life and usefulness was saved by hospital, medical and surgical attention. It was an emergency, and quick action had to be taken. During the period of treatment the father paid for no hospital, medical or surgical treatment for the infant. It seems that he was either unable, at least he did not provide for the infant. The circumstances were peculiar. The father did not provide this attention necessary to save his life and usefulness—the hospital did. The infant now has an estate, and it is unthinkable that the guardian of the infant should not pay the reasonable expense for saving the child's life and usefulness.

Again, it is alleged in the complaint that the defendant, Harris Mangum Wagner, for the serious injury, at March Term, 1928, recovered judgment for $4,500. That the hospital, medical and surgical treatment rendered by defendant was a material and substantial consideration of the judgment. The defendants contend that "This allegation is so indefinite, indirect and inconclusive as not to state a cause of action." The defendants could have asked for a bill of particulars, C. S., 534, or when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court, upon motion, may require the pleadings to be made definite and certain by amendment. C. S., 537. *Elizabeth City Water Works v. Elizabeth City,* 188 N. C., 278.

It is well settled in this jurisdiction that in an action for injuries, if the plaintiff "be entitled to recover at all, he is entitled to recover as damages one compensation—in a lump sum—for all injuries, past and prospective, in consequence of the defendant's wrongful and negligent acts. *These are understood to embrace indemnity for actual nursing and medical expenses* and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money," etc. *Ledford v. Lumber Co.,* 183 N. C., at p. 616; *Shipp v. Stage Line,* 192 N. C., 475.

The money recovered by defendant guardian in the damage suit, which it is alleged was a material and substantial consideration of the judgment, was for necessary expenses of the defendant. To allow the defendant infant to recover upon this theory and then deny the plaintiff in the present action the right to recover on the same theory of necessary expenses, would be blowing hot and cold in the same breath.

In *Chandler v. Jones,* 172 N. C., 569, *Allen, J.,* says: "The contract of an infant is voidable and not void, and it may be either ratified or disaffirmed upon attaining majority at the election of the infant. If money is paid to an infant upon a contract and it is consumed or wasted, the infant may recover the full amount due under the contract." *Rawls v. Mayo,* 163 N. C., 177; *Hogan v. Utter,* 175 N. C., 332; *Gaskins v. Allen,* 137 N. C., 430; *Baggett v. Jackson,* 160 N. C., 31. See *Faircloth v. Johnson,* 189 N. C., at p. 431. The defense of infancy must be set up in the answer, and if not pleaded will be considered as waived. *Hicks v. Beam,* 112 N. C., 642.

In this case, plaintiff alleges in substance two causes of action—one on *quantum meruit,* and the other for the money had and received for his necessary expense. The amount of recovery is bottomed on *quantum meruit* or reasonable worth of services. In the answer it is alleged that the bills rendered are exorbitant and excessive. This is a question for the jury on the trial. The courts have always been careful to see that the rights of infants are protected. With the power of the lower court to set aside verdicts, we hardly think that the court below that will try this action, would allow an exorbitant and excessive verdict to stand if such a one was rendered by a jury. For the reasons given, the judgment below is

Reversed.

STATE OF NORTH CAROLINA ON THE RELATION OF THE CORPORATION COMMISSION v. SOUTHERN RAILWAY COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, AND NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 13 November, 1929.)

1. Corporation Commission C c—Order of Commission that railroads submit plans for new union station is appealable.

Where the Corporation Commission in proceedings before it to compel certain railroad companies to provide an adequate union passenger depot in a city has found upon evidence regularly taken in hearings before it that the existing depot was inadequate and ordered the respondents to prepare and submit plans and specifications for a new depot, to which exceptions were duly and regularly filed and an appeal taken by the respondents, and the Commission orders the proceedings be certified and transferred to the Superior Court for trial, which has been done, all in conformity with the statute, C. S., 1097: *Held,* error for the judge presiding at the trial in the Superior Court to dismiss the appeal upon the ground that the order of the Commission was not appealable, and the proceedings remain in the Superior Court to be proceeded with upon the issues of fact raised for the determination of the jury.

2. **Corporation Commission C a—Petitioners are not proper parties to move for dismissal of appeal from Commission.**

The petitioners in proceedings before the Corporation Commission for the establishment of an adequate union passenger station are not proper parties to move in the Superior Court for the dismissal of the appeal of the respondents from an order of the Commission, but where such motion is made to appear to be with the assent and concurrence of the Commission the Supreme Court may decide the appeal from the order dismissing the action in the Superior Court.

APPEAL by respondents from order of *Harris, J.,* at June Term, 1929, of WAKE. Reversed.

The above-entitled proceeding was heard on a motion of the relator that the appeal of the respondents from an order made in the proceeding by the Corporation Commission of North Carolina with respect to the construction of a union passenger station in the city of Raleigh, N. C., be dismissed, for that said order was not final, but interlocutory in its nature, and for that the appeal from said order to the Superior Court of Wake County was, for that reason, premature.

From the order dismissing the appeal of the respondents in accordance with said motion, and remanding the proceeding to the Corporation Commission, respondents appealed to the Supreme Court.

Albert L. Cox and J. Melville Broughton for the relator.

S. R. Prince, John B. Hyde, Sidney S. Alderman and Smith & Joyner for Southern Railway Company.

Jas. F. Wright, Charles Abeles and Murray Allen for Seaboard Air Line Railway Company.

W. B. Rodman and R. N. Simms for Norfolk Southern Railroad Company.

CONNOR, J. This proceeding was begun by petition filed by the city of Raleigh and others on 15 November, 1926, with the Corporation Commission of North Carolina. Upon the allegations of the petition, the petitioners prayed that the Corporation Commission order the respondents to construct and equip a union passenger station in the city of Raleigh, adequate for the security, convenience and accommodation of the traveling public. The respondents filed answers to the petition, in which each denied all the essential allegations therein, upon which the prayer for relief is founded. The respondents in their answers alleged that the union passenger station heretofore constructed, and now maintained and used by them in the city of Raleigh, is adequate in all essential respects. Each of the respondents alleged that the receipts from its passenger business at Raleigh are not sufficient to justify the order prayed for by the petitioners; that said receipts have greatly decreased within the past few years and that by reason of the use of automobiles on the hard-surfaced highways recently constructed in this State, such receipts will continue to decrease. Respondents further alleged that the Corporation Commission of North Carolina is without jurisdiction to make the order prayed for in the petition, for the reason that they are engaged in inter-state commerce, and that by the act of Congress jurisdiction of the matter involved in this proceeding is conferred exclusively upon the Inter-State Commerce Commission.

After a hearing at which both the petitioners and the respondents were represented by counsel, the Corporation Commission made an order dated 31 August, 1927. Upon the facts found by it, the Commission concluded that it had jurisdiction of the subject-matter of the petition, citing in support of its conclusion to that effect *R. R. Com. of California v. Southern Pacific Co. et al.*, 264 U. S., 331, 68 L. Ed., 713. The Commission also found with respect to the financial ability of respondents to construct an adequate union passenger station at Raleigh, N. C., that "the amount of expenditures required, allocated between the three participating carriers, would be relatively nominal." After setting out in full and in much detail the facts upon which it bases its order, the Commission concludes as follows:

"Upon consideration of all the facts involved, it is found that the union passenger station now in use in the city of Raleigh is inadequate to serve the needs and convenience of the traveling public, and that the carriers should proceed without delay to provide suitable plans to construct a modern union passenger station adequate in size, arrangement and equipment to meet the needs and convenience of the traveling public, either upon the site of the present depot, with such additional land as may be necessary or at the suggested site where the main tracks of these carriers converge at Boylan Avenue; and it is

"Ordered, That the Southern Railway Company, the Seaboard Air Line Railway Company and the Norfolk Southern Railroad Company file with the Corporation Commission within ninety days from this date plans for a new and adequate union passenger station to be erected in the city of Raleigh upon either of the sites indicated in the findings herein made."

Upon the filing of this order each of the respondents duly excepted to the same, and within the time prescribed by statute, filed its exceptions in detail to the findings and conclusions made by the Commission in support of its order. Each and all these exceptions were heard and considered by the Commission, and on 6 January, 1928, the Commission made an order as follows:

"Ordered that the exceptions filed by the respondent carriers in this proceeding be, and they are hereby, overruled, and that the order of the Commission of 31 August, 1927, be and it is hereby amended by extending the time fixed therein for the filing of plans and specifications for a new and adequate union passenger station in Raleigh to ninety days from the date of this order."

To this order, each of the respondents duly excepted, and gave notice of its appeal therefrom to the Superior Court of Wake County. Exceptions to the said order were duly filed by each of the respondents, who thereafter duly assigned error based upon their several exceptions. Thereupon, on 26 January, 1928, the following order was made by the Commission:

"It is now, therefore, ordered that . . . all papers and evidence considered by the Commission, together with the assignments of error filed by the appellants, be certified and transferred to the Superior Court of Wake County as provided by statute for the certifying and transferring of such records of appeal."

In accordance with the foregoing order, the record in this proceeding, duly certified, was docketed on the civil issue docket of the Superior Court of Wake County, for trial of the issues raised by respondents' exceptions to the order of the Corporation Commission. Since the docketing of said record, the proceeding has pended in the Superior Court of Wake County.

At April-May Term, 1928, of said court, the proceeding came on for trial, when an order was made by the judge presiding that the North Carolina Railroad Company be made a party to the proceeding. Thereupon, respondents moved that the proceeding be dismissed, contending that upon the finding by the judge that the North Carolina Railroad Company was a necessary party to the proceeding, the Superior Court was without jurisdiction, for that its jurisdiction of the proceeding was, by virtue of the statute, derivative, and that the orders of the Corporation Commission which had original jurisdiction, under the statute, of the proceeding, were void, in the absence of a necessary party. This motion was resisted by the Corporation Commission, and upon its denial, respondents appealed to the Supreme Court. This appeal was dismissed. We held that the North Carolina Railroad Company was not a necessary party to the proceeding for purposes of jurisdiction, either as a respondent before the Corporation Commission, or as a defendant in the Superior Court, 196 N. C., 190, 145 S. E., 19. We said in the opinion upon that appeal: "The jurisdiction of the Superior Court of Wake County to proceed with the trial of the issues arising upon the record in this cause is not affected by the order that the North Carolina Company be made a party defendant in this proceeding."

It is now contended that the Superior Court of Wake County is without jurisdiction to try the issues raised upon the record, because the order made by the Corporation Commission in the proceeding is not appealable. The statute provides that "from all decisions or determinations made by the Corporation Commission any party affected thereby may appeal." C. S., 1097. The record in this proceeding shows, we think, that the Corporation Commission at the time its order of 31 August, 1927, was filed, interpreted said order as a decision or determination by it affecting the respondents and each of them. Upon the filing of the notice of appeal from said order, the Commission ordered that the record be certified and transferred to the Superior Court of Wake County as provided by statute. The interpretation of its order by the Corporation Commission as subject to appeal, is not conclusive, but in this case we concur with the Commission that its order made in this proceeding is appealable. There was error in the holding by the judge of the Superior Court to the contrary, and for this error the order dismissing the appeal must be reversed. The Superior Court of Wake County has jurisdiction of this proceeding and may proceed to the trial of the issues involved therein.

We have not overlooked the fact, as shown by the record, that the motion in the Superior Court to dismiss the appeal of the respondents from the order of the Corporation Commission, which is in writing, is entitled "City of Raleigh and others *v.* Seaboard Air Line Railway Co. *et al.,*" and that the motion is made by the petitioners who filed the petition with the Corporation Commission and not by the Corporation Commission. We have assumed from the argument and briefs of counsel that the motion was made with the consent or approval of the Corporation Commission, as the relator in this proceeding. We have considered the appeal, and decided the question presented upon this assumption. Otherwise the appeal would have been dismissed for the reason that the petitioners are not parties to the proceeding, in the sense that they had a right to appeal from orders made in the proceeding, while same was pending before the Commission, or to appear in the proceeding after same had been transferred to and docketed in the Superior Court. *Corporation Commission v. R. R.,* 170 N. C., 560, 87 S. E., 785. We do not dismiss the appeal, but decide that the order was erroneously made. It is, therefore,

Reversed.

DRAPER BROWN v. W. U. LEWIS.

(Filed 13 November, 1929.)

1. **Wills E b—Devise in this case held to be in fee simple.**

   Where two items of a will are apparently in conflict, one a devise to the testator's wife of the residue and remainder of the estate "all her heirs, executors, administrators and assigns," and the preceding item, "I want whatever part of my estate is left at the death of my wife, and after the younger children have been educated, equally divided among my living children at that time": *Held*, the wife takes an absolute fee-simple title to the lands thus devised, she being regarded as the primary object of the testator's bounty, and a devise being construed to be in fee simple unless a contrary intention is shown by the will or some part thereof. C. S., 4162.

2. **Same—"All" may be construed "and"—Precatory Words.**

   Under a devise of the remainder of the testator's estate to his wife and "all" her heirs: *Held*, the word "all" may be construed "and," giving the estate to her "and her heirs," or a devise in fee simple; and construed in connection with another item of the will, "I want whatever part of my estate that is left at the death of my wife to be divided among my living children," the word "want," so used, is a precatory word not affecting the quality of the estate devised to the wife, and does not create a trust.

APPEAL by defendant from *Stack, J.*, at June Civil Term, 1929, of DURHAM. Affirmed.

The following judgment was rendered in the court below:

"This cause coming on to be heard before the undersigned on an Agreed Statement of Facts, both the plaintiff and the defendant being represented by counsel, and it appearing from the Agreed Statement of Facts that on or about 11 April, 1929, the plaintiff contracted and agreed to execute a warranty deed to the defendant, and the defendant agreed to pay three hundred dollars for lot No. 54, as shown on map recorded in Book 20, at page 431; that defendant paid five dollars at the time of the signing of the said contract; that on or about 17 April, 1929, the plaintiff tendered to the defendant a warranty deed for the said property and demanded payment of the balance of two hundred ninety-five dollars. It further appeared that the plaintiff purchased the lot from Sarah A. W. Fitzgerald, who claims title to it under Item No. 10 of R. B. Fitzgerald's will, which will is duly probated and recorded in Will Book 3, at page 74. Item No. 10 reads as follows:

'Item 10: I give, devise and bequest unto my beloved wife, Sarah A. W. Fitzgerald, all her heirs, executors, administrators and assigns, all of the remainder and residue of my estate, real and personal and mixed, wheresoever and in whatsoever condition it may be found.'

From the foregoing facts and from the language of Item 10 of the will of R. B. Fitzgerald, the undersigned finds as a matter of law that Sarah A. W. Fitzgerald takes a fee simple title to the property passing under Item No. 10 of the said will, and that the deed tendered to the defendant by the plaintiff conveyed a fee simple title.

It is therefore ordered and adjudged that the plaintiff recover of the defendant the sum of two hundred ninety-five dollars with interest on two hundred ninety-five dollars from 17 April, 1929, and the cost of this action to be taxed by the clerk."

E. C. Harris for plaintiff.
L. J. Phipps for defendant.

CLARKSON, J. Item No. 9 and the material part of Item No. 10 of the will of R. B. Fitzgerald is as follows:

"Item 9: I also want whatever part of my estate that is left at the death of my wife, and after the younger children have been educated, equally divided among my living children at that time.

Item 10: I give, devise and bequest unto my beloved wife, Sarah A. W. Fitzgerald, all her heirs, executors, administrators and assigns, all of the remainder and residue of my estate, real and personal and mixed, wheresoever and in whatever condition it may be found."

Sarah A. W. Fitzgerald conveyed to the plaintiff, Draper Brown, a piece of land in fee simple, known as lot No. 54, as shown on a certain map duly recorded. No question is made as to the description of the lot. The plaintiff, Draper Brown, in turn made a contract to convey the same lot by warranty deed to the defendant, W. U. Lewis, in fee simple for $300. The defendant, W. U. Lewis, refused to accept the warranty deed tendered by plaintiff in fee simple, on the ground that under the will of R. B. Fitzgerald his wife Sarah A. W. Fitzgerald had only a life estate and could not convey to Draper Brown a fee simple title, and he in turn could not convey a fee simple title to the defendant." We cannot so hold.

Sarah A. W. Fitzgerald was the wife of R. B. Fitzgerald, and naturally, and as shown by the language of the will, the principal object of his bounty. He had given to his children and other near kin certain property, and when he came to dispose of the residue of his property, in Item 10, says: "I give, devise and bequest unto my beloved wife, Sarah A. W. Fitzgerald *all* her heirs and executors, administrators and assigns." It can be readily seen that he intended to give her a fee simple title, and if he had used the word *and* instead of *all,* the usual language at common law before the statute, in denoting a fee simple, there would have been no question. He then continues "all of the remainder and residue of my estate, real and personal, and mixed, wheresoever and in whatsoever condition it may be found." We think his intention was clear to devise a fee simple to his wife. The word *all* was a *casus,* and we think was intended to denote *and.* If he did not intend to devise a fee simple, why use the words "her heirs and executors, administrators and assigns." *Gordon v. Ehringhaus,* 190 N. C., at p. 150. Assigns means: "Those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, 'heirs, administrators and assigns.'" Black's Law Dic., p. 97.

"The use of the word 'assigns' makes it clear that the gift was absolute and not alternative. *(Kendall v. Clapp,* 163 Mass., 69) . . . In the *Keniston case (Keniston v. Adams,* 80 Me., 290), *Chief Justice Peters,* writing for the unanimous Court, said: 'The language here is to assigns as well as to heirs, and the power of assigning implies an absolute title.'" *In re Tamargo,* 220 N. Y., Reports, at p. 229.

C. S., 4162, is as follows: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

"The rule is well settled that in a will no words are necessary to enlarge an estate devised or bequeathed into an absolute fee. On the contrary, restraining expressions must be used to confine the gift to the life of devisee or legatee. *Holt v. Holt,* 114 N. C., 241; *Jones v. Richmond,* 161 N. C., 553. In *Griffin v. Commander,* 163 N. C., 230, where the testator devised to his wife 'all the remainder of my estate, real and personal, with power to give and devise the same after her death to her beloved children and grandchildren,' it was held that she took in fee simple," *Springs v. Springs,* 182 N. C., at p. 488; *O'Quinn v. Crane,* 189 N. C., 97.

These words in Item 9, "I also want," etc., may be construed as merely expressing the wish of the testator without any intention on his part to affect the title to or estate in the land devised in fee simple in Item 10 to his wife, the primary object of his bounty. *Carter v. Strickland,* 165 N. C., 69; *Springs v. Springs, supra; Weaver v. Kirby,* 186 N. C., 387; *Hass v. Hass,* 195 N. C., 734.

The principle is thus stated, citing numerous authorities, in *Carter v. Strickland,* 165 N. C., at 71-2: "And it is now the prevailing doctrine, certainly so in this jurisdiction, that such words will be given their ordinary significance, and will not have the effect, as stated, unless from the terms and dispositions of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative and that the testator intended to create a trust."

In *Hardy v. Hardy,* 174 N. C., at p. 506-7, speaking to the subject: "Under the early English and American authorities, language in a will expressive of the wish or desire of the testator as to the disposition of his property was generally held to raise a trust, or to limit the estate devised, unless a contrary intent was manifest from a consideration of the whole will; but the tendency of modern authority is to reverse this rule, and to hold that precatory words 'are not to be regarded as imperative unless it is plain from the context that the testator so intended them.' "

Precatory words: Words of entreaty, request, desire, wish or recommendation, employed in wills, as distinguished from direct and imperative terms. 49 A. L. R., 18n, 76n.

In *Laws v. Christmas,* 178 N. C., 359, the words "I want," etc., were held, in construing the intent of the testator, to create a precatory trust, but this construction was in reference to the peculiar facts of that case. In the present action the conveyance of the property in Item 10 to testator's wife was absolute and in fee simple with no "strings" on the conveyance. This absolute fee simple title made by testator of the residue of his property to his beloved wife, so named, the primary object of his bounty, cannot be fettered by the language in Item 9 of the will. In fact, the last event referred to in Item 9 is uncertain as to any estate left at the death of Sarah A. W. Fitzgerald. This item also clearly implies a right given Sarah A. W. Fitzgerald to alienate the property. It implies that it may be necessary to do this so that the younger children have an education. *Maclin v. Smith,* 37 N. C., 376; *Wells v. Williams,* 187 N. C., 134; *Roane v. Robinson,* 189 N. C., at p. 631. See *Cagle v. Hampton,* 196 N. C., 470.

In our opinion the plaintiff acquired a title in fee simple to the lot in question under Item 10 of the will and is entitled to the specific performance of his contract with defendant. For the reasons given, the judgment is

Affirmed.

STATE v. DAVE HUNT.

(Filed 13 November, 1929.)

Indictment D a—In this case held: amendment did not effect substantial change in offense charged and was properly allowed.

Where the defendant indicted for driving an automobile while intoxicated on a public highway of the State appeals from a conviction in the recorder's court, an amendment allowed by the judge in the Superior Court to make the indictment conform to the statute "or other road over which the public has a right to travel," and in accordance with the evidence: *Held*, the amendment did not effect a substantial change in the offense charged and was properly allowed by the judge in the exercise of his discretion.

APPEAL by defendant from *Harwood, Special Judge,* at January Term, 1929, of DAVIDSON. No error.

Defendant was arrested and tried in the recorder's court of the city of Thomasville on a warrant charging him with operating an automobile, while intoxicated, on a public highway of this State. He was convicted, and from the judgment of said court defendant appealed to the Superior Court of Davidson County.

At the trial in the Superior Court there was a verdict of guilty. From judgment on the verdict defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Walser & Walser for defendant.

PER CURIAM. At the call of this case for trial in the Superior Court, the Solicitor for the State moved that the warrant upon which defendant was tried and convicted in the recorder's court of the city of Thomasville be amended by inserting therein after the word "cartway," the words "or other road over which the public had a right to travel." The motion was allowed over the objection of defendant. Defendant's exception to the order of the court allowing the amendment is not sustained. The amendment was allowed in order that the warrant should conform to the statute. Chapter 230, Public Laws 1927. The crime charged in the warrant as amended is substantially the same as that charged in the warrant as originally issued. Defendant was not prejudiced by the amendment. The power of the Superior Court, in proper cases, to permit an amendment of the warrant upon which defendant was convicted in a recorder's court, where defendant has appealed to the Superior Court from the judgment upon such conviction, is well settled. *S. v. Walker,* 179 N. C., 730, 102 S. E., 404; *S. v. Price,* 175 N. C., 804, 95 S. E., 478; *S. v. Poythress,* 174 N. C., 809, 93 S. E., 919. The contention of the defendant that a new offense was charged in the warrant as amended cannot be sustained.

The evidence tended to show that the defendant, while intoxicated, was operating an automobile on a road which leads from a public highway to the place of the business of the lessee of the land over which the road is located. The public was invited to use this road and had a right to travel over the same. The evidence was submitted to the jury under instructions which are free from error. The judgment is affirmed.

No error.

STACY ADAMS COTTON, BY CORNELIUS C. COTTON, NEXT FRIEND AND FATHER, v. CAROLINA TRUCK TRANSPORTATION COMPANY AND GEORGE FOY.

(Filed 20 November, 1929.)

Master and Servant D b—Master is not liable for injuries to third person by servant acting outside scope of employment.

One injured while riding on the running board of a truck as an invitee of the driver, an employee of a transportation company, may not hold the transportation company liable under the doctrine of *respondeat superior* for an injury resulting from the negligence of the driver in the absence of allegations and evidence that the driver was acting within the scope of his employment in giving the invitation, or had authority expressed or implied to invite or permit persons to ride on the defendant's truck, or that the employer had knowledge or acquiesced in his so doing on former occasions, and where the evidence fails to disclose such authority a judgment as of nonsuit is proper.

APPEAL by defendant from *Daniels, J.*, at February Term, 1929, of CRAVEN.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff when he fell or was thrown from a truck.

The evidence for the plaintiff tends to show that on 23 October, 1926, George Foy, who prior and subsequent to that time worked for the corporate defendant as a truck driver, was operating a truck in the city of New Bern, through a section principally inhabited by the colored race. The truck in question was a Mack Truck, such as the corporate defendant uses, with the name "Carolina Truck Transportation Company" appearing on the side. One witness testified that it had the words "Carolina Instruction Company" painted on the side of the cab. On seeing the plaintiff, a colored boy eleven years of age, and his companion, James Wilson, the driver stopped and picked them up for a ride. Wilson got on the inside of the truck and the plaintiff stood on the outside, on the running board, next to the driver's seat.

It is further in evidence that George Foy had allowed the plaintiff to ride with him seven or eight times before, in the same neighborhood, and on the same truck which he was driving that day. As the truck turned the corner of Biddle and Rose streets, two unimproved streets, narrow and sandy, at a rapid rate of speed, the plaintiff's foot slipped, and not being able to hold on with his hands, or regain his footing, because of the speed of the truck, he fell to the ground and was run over by the rear wheel of the truck, sustaining serious and permanent injuries. The plaintiff testified: "The car was going fast when he turned the corner; it turned to the right; I was on the left-hand side, and as the car turned the corner I was flung out. I held up my hand trying to get back up there. I couldn't hold myself up with this one hand, so I fell off. The reason I fell off was because the car was going too fast."

The evidence for the corporate defendant tends to show that it is engaged in freight transportation by automobile trucks between certain towns, and that none of its trucks or drivers has any business for the defendant in that section of the city where the plaintiff was injured; that George Foy worked for the Carolina Truck Transportation Company, both before and after the accident, but that for several days before and several days after the plaintiff was injured, the said Foy was not in the employ of the Carolina Truck Transportation Company, and that none of its trucks was in the vicinity of the accident at the time it occurred.

George Foy testified that he was not in the employ of the Carolina Truck Transportation Company at the time of the plaintiff's injury, and that the truck he was driving belonged to a man in Goldsboro who was looking for cotton hands; that he was accompanying his driver in that section of the city where he thought such hands might be found; and that the Carolina Truck Transportation Company had nothing whatever to do with the truck which injured the plaintiff or with its driver.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment rendered thereon the defendant appeals, assigning errors.

Ernest M. Green and R. O'Hara for plaintiff.
Moore & Dunn for defendant.

STACY, C. J., after stating the case: It is questionable as to whether the evidence is sufficient to show that the truck which injured the plaintiff belonged to the defendant, Carolina Truck Transportation Company, and that the driver of the truck was about the business of said defendant at the time of the injury; but, however this may be, and conceding for the moment that such inferences are permissible, still we think the plaintiff has failed to make out a case of liability against the corporate defendant, in that, no evidence has been offered to show that the driver was acting within the scope of his employment in taking the boys on the truck for a ride. *Dover v. Manufacturing Co.,* 157 N. C., 324, 72 S. E., 1067. If the defendant Foy had invited the plaintiff to ride with him on other occasions, there is no evidence that the corporate defendant knew it. In this respect *Fry v. Utilities Co.,* 183 N. C., 281, 111 S. E., 354, is distinguishable.

It is neither alleged, nor shown by the evidence, that George Foy, when driving for the defendant company, had any authority, express or implied, to invite or to permit boys to ride on the defendant's truck. Without such authority, express or implied, the invitation of the driver, even if given, was apparently beyond the scope of his employment, and it is well settled that the master is not liable for the acts of his servant which transcend the legitimate sphere of his employment and are not done in furtherance of the master's business. *Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296; *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852; *Bilyeu v. Beck,* 178 N. C., 481, 100 S. E., 891; *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096; *Daniel v. R. R.,* 136 N. C., 517, 48 S. E., 816.

Speaking to the subject in *Sawyer v. R. R.,* 142 N. C., 1, 54 S. E., 793, the following was quoted with approval from Wood on Master and Servant, sec. 279, p. 535:

"The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment the master can be said to have *authorized* the act; for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to *(respondeat superior)* does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it."

And, again, the same author, in section 307, says:

"The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders."

To like effect is the following from *Marlowe v. Bland,* 154 N. C., 140, 69 S. E., 752: "An act is within the scope of the servant's employment, where necessary to accomplish the purpose of his employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. But the act cannot be said to be within the scope of the employment merely because the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master, nor because the servant supposed that he possessed authority to do the act in question." See, also, *Elmore v. R. R.,* 189 N. C., 658, 127 S. E., 710, and cases there cited.

Nothing was said in *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1, or *Hayes v. Creamery Co.,* 195 N. C., 113, 141 S. E., 340, both strongly relied upon by plaintiff, which, when properly applied, militates against our present position or is in conflict with any of the cases above cited. In the first, it is expressly stated that to hold the master liable for the tort of the servant, the plaintiff must show "that the driver of the truck was acting within the scope of his authority and in furtherance of his employer's business," citing as authority for the position: *Freeman v. Dalton,* 183 N. C., 538, 111 S. E., 863, and *Clark v. Sweaney,* 176 N. C., 529, 97 S. E., 474. In the second, the whole question was whether the prohibitory rule of the master had been so persistently and openly violated as to amount to its abrogation. If so, the master was deemed to have had knowledge of its violation and to have acquiesced in its abrogation, thus impliedly authorizing the acts of the servant. *Fry v. Utilities Co., supra.*

On the record, we think the action against the Carolina Truck Transportation Company should be dismissed as in case of nonsuit.

Reversed.

DAVID G. DAVIS v. Z. M. L. JEFFREYS, J. T. JEFFREYS AND R. A. JEFFREYS, TRADING AS JEFFREYS' SONS.

(Filed 20 November, 1929.)

1. **Negligence C a—Contributory negligence which is proximate cause of injury bars plaintiff's right of recovery.**

In an action to recover damages for an injury alleged to have been negligently caused by the defendant, plaintiff's contributory negligence that will bar his recovery is that which, concurring and coöperating with the negligence of the defendant, becomes the real, efficient and proximate cause of the injury, or that cause without which the injury would not have occurred, and it is not necessary that the plaintiff's negligence be the sole proximate cause.

2. **Highways B g—In this case held: plaintiff's evidence disclosed contributory negligence barring his recovery.**

Where the action for damages arising from the defendant's truck and trailer being nearly across a public road near the corporate limits of a town at night without lights, etc., in violation of C. S., 2615, and the plaintiff's own evidence shows that his collision therewith was caused by his excessive speed in driving his motorcycle through rain and partial sleet, and that otherwise he could have passed in safety: *Held,* notwithstanding the defendant's negligence, the plaintiff's own evidence disclosed contributory negligence barring his recovery, and defendant's motion as of nonsuit was properly granted.

3. **Negligence D c—Where plaintiff's own evidence discloses contributory negligence barring recovery nonsuit is proper.**

Where the plaintiff's own evidence shows that his contributory negligence in a personal injury action bars his recovery a judgment of nonsuit is properly rendered.

APPEAL by plaintiff from *Daniels, J.*, at June Term, 1929, of CARTERET.

Civil action to recover damages for an alleged negligent injury suffered by plaintiff when he ran his motorcycle into the defendant's truck, which was standing on a public highway about 9 o'clock at night, without any lights.

The evidence tends to show that on the night of 2 May, 1928, about 9 p.m., the defendants' truck and trailer, while being loaded from a freight car, was standing partly across the highway near or within the corporate limits of Morehead City, but there was room for cars or motor vehicles to pass on the pavement or hard surface. The plaintiff testified that he was driving his motorcycle from Beautfort to Morehead City; that his lights were in good condition; that they would show a distance of 150 yards down the highway; that he was running about 30 or 35 miles an hour; that he could bring his motorcycle to a full stop within 100 feet, if proceeding at 25 miles an hour, or within 150 feet, if proceeding at 40 miles an hour; that he did not see the truck in time to avoid running into it; that it was a dark night, with a dense atmosphere, probably drizzling rain a little.

When the plaintiff was about 300 feet from the truck, a Mr. Crump (presumably defendant's agent) tried to stop the plaintiff by waving his hands and calling to him, but plaintiff testified: "I did not stop as soon as I saw the man waving his hands because I did not want to stop in the dark to pick people up. I didn't know him, but slowed down and threw the motor out of gear. I put my foot on the brake of the motorcycle and slid right on it. I couldn't stop, it was so close to the object I saw in front of me. It looked like a mountain when I first saw it, and when I got a little closer I saw it was a truck. It did not have any lights on it, and I slid right on it."

R. A. Cherry, witness for plaintiff, testified that he was traveling on the highway at about 20 miles an hour and that the plaintiff passed him, two or three blocks from the scene of the accident, going "about three times as fast as I was" *(i. e.,* 60 miles an hour).

The plaintiff's motorcycle bounded back about "half the distance of this court room" (40 feet) after striking the truck, and he was seriously injured. His motorcycle was demolished.

From a judgment of nonsuit entered on motion of the defendant at the close of plaintiff's evidence, the plaintiff appeals, assigning error.

C. R. Wheatley and Luther Hamilton for plaintiff.
Kenneth C. Royall and J. F. Duncan for defendants.

STACY, C. J., after stating the case: Conceding that the defendants were negligent in allowing their truck and trailer to stand partly across the highway in the night time, without lights, in violation of C. S., 2615, still we think the evidence discloses a clear case of contributory negligence on the part of the plaintiff which bars a recovery. *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145.

Contributory negligence, such as will defeat a recovery in an action like the present, is the negligent act of the plaintiff, which concurring and coöperating with the negligent act of the defendants, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred. *Bailey v. R. R.,* 196 N. C., 515, 146 S. E., 135; *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298; *Weston v. R. R.,* 194 N. C., 210. And it is sufficient to defeat a recovery, in a case like the one at bar, if the plaintiff's negligence is one of the proximate causes of the injury; it need not be the sole proximate cause. *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672. The expression "contributory negligence" implies *ex vi termini* that the negligence of the defendant is one of the causes of the injury. *Fulcher v. Lumber Co.,* 191 N. C., 408, 132 S. E., 9.

A motorcycle running, on a dark rainy night, fast enough to be demolished and thrown back a distance of 40 feet on striking a truck standing in the road, was necessarily being driven at a reckless rate of speed under the circumstances disclosed by the record.

A judgment of nonsuit is properly entered when the contributory negligence of the plaintiff is established by his own evidence, as he thus proves himself out of court. *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307; *Wright v. R. R.,* 155 N. C., 325, 71 S. E., 306.

Affirmed.

ED. HUGH LEE, ADMINISTRATOR OF ED. HUGH LEE, JR., v. CAVENESS PRODUCE COMPANY.

(Filed 20 November, 1929.)

1. **Pleadings D a—Where pleadings liberally construed allege cause of action demurrer thereto will be overruled.**

   Upon a demurrer the pleadings are liberally construed in the light most favorable to the pleader, and where there are conflicting allegations, and one of them is sufficient to allege a cause of action, the demurrer thereto will not be sustained. C. S., 535.

2. Highways B h—In this case held: allegations of complaint were sufficient to state cause of action for actionable negligence.

Allegations in the complaint liberally construed that the defendant's driver of its truck, acting within the scope of his employment and in furtherance of his master's business, stopped the truck he was driving on a dangerous place on the highway on the top of a hill near a curve in the road, at night, that he turned off the rear light of the truck and turned it on again when he heard an automobile approaching, and that the plaintiff's intestate was guiding a car being towed by the car heard by the driver of the truck, and that the light on the truck was turned on too late for the intestate to see the danger and guide his car in safety behind the lead car: *Held*, the allegations of actionable negligence against the defendant are sufficient as against a demurrer.

APPEAL by defendant from *Harris, J.*, at Second June Term, 1929, of WAKE.

Civil action to recover damages for an alleged wrongful death caused by a collision between the car in which plaintiff's intestate was riding and the defendant's truck.

The material allegations of the complaint, so far as essential to a proper understanding of the legal question involved, may be abridged and stated as follows:

1. That plaintiff is the duly appointed administrator of the estate of Ed. Hugh Lee, Jr., deceased; and that the defendant is a corporation engaged in transporting by trucks goods, wares and merchandise over the highways of the State.

2. That on the night of 6 December, 1928, plaintiff's intestate and a colored man by the name of Joe Williams, went out in a Buick roadster to tow in a Dodge sedan automobile belonging to plaintiff's intestate.

"That they arrived at Auburn about 4:30 a.m., and secured the said Dodge car to the rear of said Buick roadster by a towing chain, leaving an interval between the two cars of about 12 feet; that the said Williams then got into the Buick car and plaintiff's intestate got into the Dodge car which was to be towed, and said parties proceeded with said cars on highway No. 10 in the direction of Smithfield, N. C.; that the said Williams, while driving in a careful and prudent manner on a stretch of road which was practically straight, at a speed somewhere around 25 miles an hour, when in about 4 miles of Smithfield, suddenly saw the red rear light of defendant's truck flash into view; that at this time the car driven by said Williams was within 50 to 75 yards of the said light; that the said Williams could not instantly tell whether said truck was moving or not, but he immediately began to reduce his speed as much as was practical, taking into consideration that he was towing another car, and proceeded to turn to the left in order to avoid said light.

"That when within 25 or 35 yards of said red light the bulk of the truck suddenly came into view, extending 7 or 8 feet in the air above said red light and projecting over the hard surface road to the extent of something like 4½ feet; that the said Williams thereupon continued to turn to the left and passed the end of said truck, projecting into the road, by a margin of 2 or 2½ feet.

"That plaintiff's intestate, who could not see the light of the truck, the same being hidden by the Buick car, was unable to follow directly in the path of the car driven by Williams by reason of the fact that he did not have sufficient time to make the turn in the same manner and to the same degree as was done by the said Williams; that the car being guided by plaintiff's intestate crashed into the rear of defendant's said truck, and plaintiff's intestate was instantly killed."

3. "That the point at which the agent and servant of defendant company had stopped his truck is on a slight curve and something like 200 yards on the Raleigh side from where the said highway No. 10 makes an abrupt turn to the left and curves over a steep hill; that the said Williams was aware of the fact that he was approaching a dangerous curve on a hill and, not knowing exactly how close he was to said curve, was well over on the right side of the road at the time when he first saw the red light of defendant's truck, knowing that a towed car might be difficult to manage if he met a car speeding towards him and coming over said hill and around said curve."

4. "That defendant's truck was loaded with produce belonging to defendant, which defendant's servant was conveying to certain points in Eastern North Carolina; that said driver had stopped the truck at a point he knew to be dangerously close to an abrupt curve coming over a steep hill a short distance in front of him allowing the rear of said truck to project upon the hard surface a distance of more than 4½ feet, and had cut out the lights on said truck and only turned the same on when he heard the approach of the car driven by the said Williams and not before said car had arrived within a distance of 50 to 75 yards from where he had parked said truck."

5. "That plaintiff's intestate met his death, as hereinbefore set forth, by reason of the careless, negligent and wanton conduct of defendant's said agent and servant, in that:

"(a) He parked said truck in such a manner that the rear of the same protruded over the hard surface road for a distance of more than 4½ feet, occupying at the time of the death of plaintiff's intestate, more than half of the right-hand side of said road.

"(b) After parking said truck, as hereinbefore described, he cut off his lights and failed to turn the same on until the car driven by Williams was within 50 to 75 yards of said truck, thus rendering it impossible for the said Williams and plaintiff's intestate to avoid the collision between the car being towed and the said truck.

"(c) Defendant's said servant parked his truck at a dangerous point in the road by reason of a sharp curve coming over a steep hill a short distance in front of him, well knowing that the position in which he had parked his truck added greatly to the risk of a collision between his said truck and a towed car going in the same direction his truck was headed."

6. That plaintiff has been damaged in the sum of $50,000.

A demurrer was interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, or that upon the facts stated in the complaint, the death of plaintiff's intestate as a matter of law, was the direct and proximate result of the negligence of Joe Williams, agent and servant at the time of plaintiff's intestate.

From a judgment overruling the demurrer, the defendant appeals, assigning error.

Pou & Pou and Jno. W. Hinsdale for plaintiff.
Clyde A. Douglass for defendant.

STACY, C. J. The plaintiff alleges, as we understand his complaint, that the defendant's truck was parked on the side of the road, partly on the hard surface, in the night time, without any lights burning, in violation of C. S., 2615, and that this condition continued—the lights not being turned on by the defendant's servant in charge of the truck—until it was too late for Williams, in the exercise of reasonable care, to pass in safety with both the lead car, which he was driving, and the car that was being towed, in which plaintiff's intestate was riding. Thus, it is alleged, in effect, that the plaintiff's intestate was killed by the negligence of the driver of defendant's truck while acting in the scope of his employment and in furtherance of the defendant's business. The complaint, therefore, is good as against a demurrer. *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1.

We have not overlooked the allegation set out in paragraph 2 above, and stressfully urged as fatal by the defendant, to the effect that plaintiff's intestate could not see the light of the truck because of the Buick car, and was unable to follow directly in the path of the car driven by Williams, by reason of the fact that he did not have sufficient time to make the turn in the same manner and to the same degree as was done by the said Williams. But this allegation, taken in connection with others appearing in the complaint, we apprehend, may be interpreted in a light favorable to the plaintiff, even if it also be susceptible to a contrary interpretation. Nor have we failed to observe that in one place plaintiff alleges the truck was "stopped on a slight curve," while in another he says that Williams was driving "on a stretch of road which was practically straight."

When a case is presented on demurrer, we are required by the statute, C. S., 535, to construe the complaint liberally, "with a view to substantial justice between the parties," and in enforcing this provision, we have adopted the rule "that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." *Dixon v. Green,* 178 N. C., 205, 100 S. E., 262.

The demurrer interposed by the defendant was properly overruled. *S. v. Bank,* 193 N. C., 524, 137 S. E., 593.

Affirmed.

A. S. HERMAN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 November, 1929.)

1. **Negligence B c—Where intervening negligence of third person is sole proximate cause of injury defendant is not liable.**

   Where a passenger in an automobile is injured in a collision of an automobile and a train at a grade crossing, and sues the railroad company for damages resulting therefrom, and his own evidence tends only to show that the accident resulted from the negligent driving of the automobile by another, and that this negligence of the driver was the sole proximate cause of the injury, or that cause which acting in unbroken sequence produced the injury, and without which it would not have occurred, and that the negligence of the railroad company, if any, would not have caused injury except for the intervening negligence of the driver: *Held,* the railroad company is not liable in damages to the plaintiff, and a judgment as of nonsuit was properly entered.

2. **Railroads D b—Where negligence of third person is the sole proximate cause of accident at crossing railroad is not liable.**

   Where the collision between an automobile and a train at a grade crossing is caused solely by the negligence of the driver of the automobile, an occupant therein may not recover damages for his injuries sustained therein from the railroad company.

APPEAL by plaintiff from *Cranmer, J.,* at April Term, 1929, of CUMBERLAND.

Civil action to recover damages for an alleged negligent injury caused by a collision between an automobile in which plaintiff was riding and one of the defendant's trains.

The evidence discloses that the automobile in which plaintiff was riding when it collided with the defendant's locomotive at a highway crossing in the village of Raynham, Robeson County, was running about 30 or 35 miles an hour; it skidded approximately 90 feet, presumably due to the driver's effort to stop, before striking the rear driving wheel just under the fireman's seat. "I saw the car hit and rear up like a bucking horse," said one of the plaintiff's witnesses. The train was approaching, slowing down for the station stop, at a rate of from 10 to 12 or 15 miles an hour.

Judgment of nonsuit was entered at the close of plaintiff's evidence on the theory that the sole proximate cause of plaintiff's injury was the negligence of the driver of the car in which plaintiff was riding. Plaintiff appeals, assigning error.

S. Burnell Bragg and Dye & Clark for plaintiff.
Rose & Lyon for defendant.

STACY, C. J. We fail to discern from the record any evidence of negligence on the part of the railroad company which contributed to the plaintiff's injury. Even if the engineer or fireman did fail to ring the bell or sound the whistle, of which there is only negative testimony with positive evidence to the contrary, still the defendant had a right to operate the train over its track, and the negligence of the driver of the automobile is so palpable and gross, as shown by plaintiff's own witnesses, as to render his negligence the sole proximate cause of the injury. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672.

Upon all the evidence, we think it is manifest that the alleged negligence of the defendant, Atlantic Coast Line Railroad Company, was not in law a proximate cause of plaintiff's injury.

Speaking to the subject in his valuable work on Negligence (138), Mr. Wharton very pertinently says: "Suppose that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff: is the defendant liable to plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of defendant's responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable."

The same rule announced by *Mr. Justice Strong* in *R. R. v. Kellogg,* 94 U. S., 469, regarded as sound in principle and workable in practice, has been quoted with approval in a number of our decisions. He says: "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

Where the plaintiff's evidence shows that his injury was due to the negligence of a third person, and not to that of the defendant, it is proper to nonsuit the action, for he thus fails to make out a case against the defendant. Such was the holding of the trial court, and the judgment is affirmed. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

Affirmed.

FANNIE MARTIN, ADMINISTRATRIX, v. GREENSBORO-FAYETTEVILLE BUS LINE.

(Filed 20 November, 1929.)

Master and Servant D b—In this case held: servant was not acting within scope of employment or about master's business and master was not liable for injuries to third person.

In order to hold a master responsible for the negligence of the servant in causing an injury to a third person, it is essential that the latter should be acting in the scope of his employment and in the furtherance of the master's business, and in an action against an auto-bus line for damages resulting from the negligence of its driver in running over and killing plaintiff's intestate, a motion as of nonsuit should be entered if the plaintiff's own evidence tends only to show that a bus of the defendant was at the time of the injury being driven by an employee of the garage in which the defendant stored its buses who was returning the bus to the garage after the driver thereof had ridden home in it contrary to the express orders of the defendant and without his knowledge or acquiescence.

APPEAL by plaintiff from *Sink, Special Judge,* at May Term, 1929, of DURHAM.

Civil action to recover damages for an alleged wrongful death occasioned by defendant's bus striking plaintiff's intestate on Main Street in the city of Durham, knocking him down and inflicting injuries from which he died.

The evidence discloses that on 10 October, 1926, Lester Griffin, driver of one of defendant's Greensboro-Fayetteville buses, arrived in Durham at 6:45 p.m., about an hour late, due to heavy traffic on the road; that, after unloading his passengers, he carried the bus to King's garage, where the defendant stores its buses for the night, and asked that one of the tires, which had been punctured, be patched, so that he could leave next morning on schedule time; that Mr. King replied he was too busy to repair the tire—his full force not working on Sunday—and suggested that the bus be taken to Harris' garage for the needed repairs, which was done; that Griffin's wife and child met him at Harris' garage and rode back with him after the repairs had been made; that upon arriving at the storage garage, about 8 p.m., Griffin asked King, who had charge of storing the bus for the night, if he could send him and his family home, as he was about half sick and was not feeling well; that King replied he had no available car, but that he might go in the bus, taking Clarence Bullock, an employee of the garage and a good driver, to bring it back; that in consequence of this suggestion, Bullock got in the bus and rode with Griffin and his family to Griffin's home, when and where the bus was turned over to Bullock by Griffin, and that on his way back to King's garage, Bullock ran into and killed plaintiff's intestate.

The evidence further discloses that Griffin, the regular driver of the bus, was under positive instructions from the defendant not to use the bus after reaching Durham, but to store the same for the night in King's storage garage, and Mr. King was to wire the defendant's manager in Greensboro whenever the bus arrived at his garage later than 6:30 p.m., so that the delay might be investigated; and that the use of the bus from the time it reached the storage garage until its scheduled departure on the following morning was unauthorized, and without the knowledge, consent or acquiescence of the defendant or any of its agents.

From a judgment dismissing the action as in case of nonsuit, the plaintiff appeals, assigning error.

Bryant & Jones for plaintiff.
John W. Hester for defendant.

STACY, C. J., after stating the case: When it is sought to hold one responsible for the neglect or tort of another, under the doctrine of *respondeat superior,* at least three things must be made to appear, yea four, and, upon denial of liability, the plaintiff must offer "some evidence which reasonably tends to prove every fact essential to his success" *(S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804). These are:

1. That the plaintiff was injured by the negligence of the alleged wrongdoer. *Hurt v. Power Co.,* 194 N. C., 696, 140 S. E., 730.

2. That the relation of master and servant, employer and employee, or principal and agent, existed between the one sought to be charged and the alleged *tort-feasor.* *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096.

3. That the neglect or wrong of the servant, employee, or agent, was done in the course of his employment or in the scope of his authority. *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Fleming v. Knitting Mills,* 161 N. C., 436, 77 S. E., 309.

4. That the servant, employee or agent, was engaged in the work of the master, employer, or principal, and was about the business of his superior, at the time of the injury. *Gurley v. Power Co.,* 172 N. C., 690, 90 S. E., 943.

It is elementary law that the master is responsible for the negligence of his servant which results in injury to a third person when the servant is acting within the scope of his employment and about the master's business. *Roberts v. R. R.,* 143 N. C., 176, 55 S. E., 509; 8 L. R. A. (N. S.), 798, 10 Ann. Cas., 375. It is equally elementary that the master is not responsible if the negligence of the servant which caused the injury occurred while the servant was engaged in some private matter of his own or outside the legitimate scope of his employment. *Bucken v. R. R.,* 157 N. C., 443, 73 S. E., 137; *Doran v. Thomsen,* 76 N. J. L., 754.

It is further held that the owner of an automobile is not liable for injuries caused by it, merely because of ownership. *Linville v. Nissen, supra.* And it is well settled by numerous decisions, here and elsewhere, that "the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of such neglect or wrong, at the time and in respect to the very transaction out of which the injury arose." *Wyllie v. Palmer,* 137 N. Y., 248; *Doran v. Thomsen, supra; Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852.

In the instant case it could hardly be said that Bullock was the servant of the defendant in bringing the bus back to the storage garage, or that Griffin was acting within the scope of his employment and about the defendant's business, when he took the bus to drive himself and family home. *Cotton v. Transportation Co., ante,* 709. It is universally held that "the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders or doing his work. So that, if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable." *Howe v. Newmarch,* 94 Mass., 49.

Speaking to the subject in *Dover v. Manufacturing Co.,* 157 N. C., 324, 72 S. E., 1067, *Brown, J.,* delivering the opinion of the Court, said: "This doctrine of *respondeat superior,* as it is now established, is a just but a hard rule. The master exercises care in the selection of his servant and retains in his service only such servants as are prudent and trustworthy; the servant in the prosecution of the master's business must of necessity pass beyond his sight and out of his control; and yet the law makes the master liable for the conduct of the servant. The application of this principle without working the greatest injustice to every employer of a servant is made possible only by the limitation established by the courts, that when the servant does an act which is not within the scope of his employment the master is not liable. 'Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule as it is now established by the later judicial declarations should be strictly held within its defined limits. It is a rule capable of great abuse and much hardship and the courts should guard against its extension or misapplication.' *Holler v. Ross,* 68 N. J. Law, 324."

The decisions in *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1, and *Freeman v. Dalton,* 183 N. C., 538, 111 S. E., 863, both strongly relied upon by plaintiff, are not in conflict with our present position or with any of the cases above cited. In the first, it is expressly stated that to hold the master liable for the tort of the servant, the plaintiff must show "that the driver of the truck was acting within the scope of his authority and in furtherance of his employer's business," citing in support of the position: *Freeman v. Dalton, supra,* and *Clark v. Sweaney,* 176 N. C., 529, 97 S. E., 474. In the second, the only question presented and decided was that the trial court erred in instructing the jury, "if the plaintiff has satisfied you by the greater weight of the evidence that he was injured by the defendant's automobile, then the burden would be on the defendant to show by the greater weight of the evidence that although he was the owner of the automobile, it was not being used in his business." This was the extent of the decision in *Freeman's case,* and while some expressions in the opinion, not necessary to the decision, may be out of line with the holdings in other cases, *e. g., Wilkie* *v. Stancil,* 196 N. C., 794, 147 S. E., 296, *Tyson v. Frutchey,* 194 N. C., 750, 140 S. E., 718, *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852, *Reich v. Cone,* 180 N. C., 267, 104 S. E., 530, and *Bilyeu v. Beck,* 178 N. C., 481, 100 S. E., 891, it should be remembered, as pointed out by *Marshall, C. J.,* in *U. S. v. Burr,* 4 Cranch, 470, that "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."

Applying these principles to the facts before us, it would seem that the plaintiff ought not to recover of the defendant.

Affirmed.

ADAMS, J., concurring: I concur in the opinion written by the *Chief Justice,* and take occasion to stress the statement that in *Misenheimer v. Hayman,* 195 N. C., 613, the Court did not hold that the owner of a motor car is liable for injuries caused by it, merely because of his ownership. In that case there was no controversy as to the negligent operation of the truck. The questions were (1) whether the defendant was the owner of the truck; (2) whether at the time of the injury the truck was driven by the defendant's employee; and (3) if it was, whether the employee was then engaged in the prosecution of the defendant's business? The court concluded, on the defendant's motion for nonsuit, that the evidence, while not complete in all respects, was not so meager as to require dismissal of the action as a matter of law.

WILLIAM JEFFREY v. OSAGE MANUFACTURING COMPANY.

(Filed 20 November, 1929.)

Master and Servant D b—In this case held: plaintiff established prima facie case that servant was acting in furtherance of master's business.

Where the plaintiff's evidence in his action against the owner of an auto-truck for damages resulting from the negligence of the defendant's driver tends to show that a truck was found on the highway on a business day during business hours and was operated by the regular employee of the defendant, whose regular business or employment was the duty of driving and operating the said truck: *Held,* the evidence is sufficient to furnish a basis for a jury to infer that the truck at the time was being operated in the furtherance of the master's business, and makes out a prima facie case, and upon contradictory evidence, the question is for the jury.

CIVIL ACTION, before *Stack, J.,* at January Term, 1929, of GASTON.

The plaintiff was a resident of Cambridge, Mass., and had been spending some time in Florida. He left Florida and returning to New York as a passenger and guest of John Warner, who lived in Watertown, Mass.

The evidence tended to show that plaintiff left Asheville about 8:30 on the morning of 22 March, 1928. When the car reached a point on highway No. 20 between Kings Mountain and Bessemer City, going east toward Gastonia, it collided with a truck owned by the defendant and operated at the time by a colored driver named William Shifty. There was sufficient evidence of negligence to be submitted to the jury. The defendant admitted the ownership of the truck; that the driver, Shifty, was in its regular employment, and that said Shifty was the regular driver of said truck and had been in the employment of the defendant for four or five years.

The evidence further tended to show that Shifty's mother lived some distance from the defendant's plant on the road between Gastonia and Bessemer City, and that on the day of the injury Shifty, in company with two other negro employees of the defendant, took the truck at the dinner hour to visit Shifty's mother, who was sick. The collision occurred at a point near the home of the driver's mother. The defendant offered evidence to the effect that the driver, Shifty, had taken the truck at the dinner hour without the knowledge or consent of defendant and contrary to the express orders and instructions given him by the officers of defendant to the effect that the driver should not use the truck for any purpose without orders from his superiors. This evidence came from several witnesses for the defendant and was uncontradicted.

There was evidence that Shifty was the only person who ever drove the truck, and that on previous occasions he had driven the truck on the road between Gastonia and Bessemer City.

Issues of negligence and damages were submitted to the jury and answered in favor of plaintiff.

The verdict awarded damages in the sum of $7,200. From judgment upon the verdict the defendant appealed.

Ernest R. Warren, John G. Carpenter and Ryburn & Hoey for plaintiff.

J. Lawrence Jones and S. J. Durham for defendant.

BROGDEN, J. What must a plaintiff prove, in order to make out a prima facie case, for personal injury inflicted by a truck?

Our decisions are to the effect that a prima facie showing takes the case to the jury, and it is therefore a question for the jury to determine whether or not the necessary facts have been established. This rule of law was tersely expressed in *Speas v. Bank,* 188 N. C., 524, as follows: "A prima facie case, or prima facie evidence, does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. The opposing party, however, is not required as a matter of law to offer evidence in reply. He only takes the risk of an adverse verdict if he fail to do so. The case is carried to the jury on a prima facie showing, and it is for them to say whether or not the crucial and necessary facts have been established."

Our decisions are also to the effect that a plaintiff, in order to recover for personal injury inflicted by an automobile or truck, must offer evidence tending to prove the following:

1. That the truck or automobile inflicting the injury was at the time operated in a negligent manner, or that the driver thereof was guilty of negligence which was the proximate cause of the injury.

2. Where the driver or operator of the conveyance at the time of the injury was other than the owner, the plaintiff must offer evidence tending to show the ownership of the vehicle if such owner is sought to be charged with the negligence of the driver or operator.

3. That if the injury was caused by the negligence of an agent, evidence must be offered tending to establish the agency.

4. That the agent or employee at the time of the injury, was acting within the scope of his employment as contemplated and defined by law. *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852; *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1; *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Wilkie v. Stancil,* 196 N. C., 794, 146 S. E., 81; *Martin v. Bus Line, ante,* 720; *Cotton v. Transportation Co., ante,* 709.

In the case at bar there was ample evidence of negligence and the defendant admitted ownership of the truck, and further admitted that the driver was a regular employee and had previously been the regular driver of the truck in the furtherance of the business of said defendant. However, the defendant offered strong evidence to the effect that at the time of the injury the driver was not engaged in its business, but had taken said truck, a substantial distance from the mill, at the dinner hour to visit his mother, and that this was done without the knowledge, consent or approval of the defendant and contrary to its express and repeated instructions. This evidence was not contradicted, and upon such showing the defendant earnestly contends that the plaintiff ought not to recover, because there was no evidence tending to prove that the driver at the time of the injury was acting within the scope of his employment and in furtherance of the master's business. In other words, this phase of the case is reduced to a single proposition, to wit: "Must a plaintiff offer evidence that the driver of the truck was acting within the scope of his employment, or may the jury infer such fact, when it is either admitted, or there is evidence tending to show, the ownership of the truck, and that the driver was in the regular employment of such owner as the habitual operator of said vehicle.

This question has been the subject of extended debate by the courts of this country. There is a sharp division in the judicial reasoning upon the proposition and the result achieved by various courts are utterly divergent and irreconcilable, unless resort, perhaps, be made to microscopic distinctions. The general aspect of the question is stated in Huddy on Automobiles 7th edition, section 795, p. 873, as follows: "In a majority of the jurisdictions passing upon the question, it is held that evidence of defendant's ownership of a motor vehicle, coupled with proof that the driver is in his regular employment or is a member of his family raises a presumption that at the time he is acting for the owner and within the scope of the owner's business. . . . In a minority of jurisdictions, however, it is held that such evidence does not present a prima facie case of liability, but that the plaintiff must show affirmatively that at the particular occasion under consideration the driver was acting for his master and within the scope of his master's business."

The Supreme Judicial Court of Massachusetts has considered the question in various aspects. Upon the particular question involved, the Court came to this conclusion in *Persino v. De Stefano,* 137 N. E., 664: "If the servant was not then engaged in the course of his employment, but was acting for a purpose of his own, the master would not be liable. If the defendant was the owner of the truck, and the driver was in his general employment, those facts would not be sufficient to show that he (the driver) was acting within the scope of his employment at the time of the accident." *Washburn v. Owens Co.,* 147 N. E., 546. The Supreme Court of Maryland in the case of *Pollock v. Watts,* 121 N. E., 238, held that the presumption that the driver is agent of the owner is rebuttable, and if rebutted by uncontradicted testimony, then the case ought not to go to the jury. The Supreme Court of Michigan considered the proposition in *Union Trust Co. v. American Commercial Car Co.,* 189 N. W., 23. The Court, quoting with approval, said: "It is now quite generally held by the courts that a rebuttable or prima facie presumption has no weight as evidence. It serves to establish a prima facie case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself." *Curry v. Kelley,* 195 N. W., 617; *Der O'Hannessian v. Elliott,* 135 N. E., 518.

The Supreme Court of Pennsylvania adopts a contrary view. In *Holzheimer et ux. v. Lit Bros.,* 105 Atlantic, 73, the Court declared: "There was evidence, however, that the truck bore the name of defendant company. This was sufficient to establish, not only a prima facie case that the defendants were the owners of the truck, but also whether it was then in charge of their servant or employee. This was presumptive evidence, and, as has been frequently ruled, was quite sufficient to carry the case to the jury. As a presumption it was of course rebuttable, but this does not mean that it had any less presumptive force than it would have had had it rested on direct evidence," etc. Again in *Thatcher v. Pierce,* 125 Atlantic, 302, the same Court said: "Where a truck or car is used for business purposes and is identified as the property of the owner, a presumption arises that the truck was engaged in the master's business." The Pennsylvania Court makes a distinction between trucks and pleasure vehicles. This distinction was sharply drawn in the case of *Laubach v. Colley,* 129 Atlantic, 88. The Court said: "A distinction has been drawn between cars employed for business and pleasure purposes. In the case of the former, the operation is presumed to be in the master's service, and the burden rests on him to show the contrary to be true." *Hartig v. American Ice Co.,* 137 Atlantic, 867.

In North Carolina the decisions are not in full accord, but the general principle is that mere ownership plus negligence is not sufficient to constitute a prima facie case. Indeed, in *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1, this Court held that the plaintiff must show "that the driver of the truck was acting within the scope of his authority and in furtherance of his employer's business." The case, however, does not undertake to decide how this must be shown.

Summarizing the plaintiff's evidence as disclosed in the present record, we have substantially the following fact situation: A truck, which is in itself, a business vehicle or devoted exclusively to business purposes, is found on the highway on a business day during business hours, operated by the regular employee of the defendant, and one whose regular business or employment was the duty of driving and operating said vehicle.

We are of the opinion, and so hold, that these facts furnish a sound and reasonable basis for a jury to infer that the truck at the time was being operated in the furtherance of the master's business. Therefore, it necessarily follows that the plaintiff by such showing, made out a prima facie case. It was the function of the jury to determine the weight and credibility of the evidence offered by the parties.

No error.

STATE v. STANCIL PHIFER.

(Filed 20 November, 1929.)

Criminal Law I e—In this case held: prosecution overstepped bounds in argument to jury and defendant is entitled to a new trial.

Where in the prosecution for murder for the reckless driving of an automobile the counsel for the private prosecution in his argument to the jury appeals for a conviction because others had been killed by drunken drivers on the same highway and no one had been punished for it, and upon objection by the defense on the ground that the argument was not sustained by the evidence, the trial court remarked that he could not regulate argument of counsel unless beyond bounds, and instructed the counsel to continue: *Held*, the counsel for the prosecution went outside the record and overstepped the bounds, and the defendant is entitled to a new trial.

APPEAL by defendant from *Stack, J.*, at May Term, 1929, of MECKLENBURG.

Criminal prosecution tried upon an indictment charging the defendant with the murder of Estelle Godfrey.

On the night of 24 November, 1928, near Matthews, N. C., there was a collision between defendant's automobile and another car in which the deceased was an occupant. The driver of each machine claimed that the other was responsible for the collision, and there is evidence that the defendant was drinking at the time.

The attorney for the private prosecution, in his argument to the jury, used the following language:

"Gentlemen of the jury, drunken men are driving their cars all over the highways of North Carolina, and are running over people and killing them, and have no regard for human life. I argue to you that drunken drivers on our highways must be stopped. I contend to you, gentlemen of the jury, that this man has operated his automobile in a drunken condition, and I appeal to you to put a stop to transporting whiskey when operating automobiles on the highways. Drunken drivers of automobiles have killed others on this same highway and have not been punished for it."

Counsel for the defendant immediately objected and asked that the jury be instructed not to consider the argument that others had been killed on this same highway by drunken drivers, as there was no evidence to support such an argument, but the court simply replied: "I cannot tell a lawyer what to say and what not to say, unless he goes beyond bounds. Proceed with the argument and argue the evidence in the case before the jury." Exception by defendant.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a term of not less than five nor more than seven years at hard labor.

The defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Jake F. Newell and Stewart, MacRae & Bobbitt for defendant.

STACY, C. J., after stating the case: It is conceded by the Attorney-General that counsel for the private prosecution went outside the record and overstepped the bounds in appealing to the jury to convict the defendant because others had been killed by drunken drivers on this same highway and no one had been punished for it. *S. v. Evans,* 183 N. C., 758, 111 S. E., 345.

In *Washington v. State,* 87 Ga., 133, 13 S. E., 131, the Supreme Court of Georgia held that, on the trial of an indictment for arson, it was error to allow the solicitor-general, over objection of defendant's counsel, to state, in his concluding argument, that frequent burnings had occurred throughout the country, and to urge the jury, in consequence thereof, strictly to enforce the law in the case then on trial.

To like effect is the holding of the Supreme Court of Indiana in *Ferguson v. State,* 49 Ind., 33: "On the trial of an indictment for murder, it is error for counsel for the State, in argument to the jury, to comment on the frequent occurrence of murders in the community and for the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant, and for the court, upon objection by the defendant to such language, to remark to the jury that such matters are proper to be commented upon."

The State ought not to rely upon a sacrificial altar for the observance or enforcement of its laws. *S. v. Green, ante,* 624; *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720. And herein lies a distinction or bit of philosophy sometimes overlooked. Law observance and law enforcement are two different things. The one belongs to the kingdom of right living, the other to the field of retributive justice. It was said in Blackstone's time, that, from a comprehensive viewpoint, human punishments are rather calculated to prevent future crimes, by amendment, disability or example, than to expiate past offenses. "They tend to the amendment of the offender, or to deprive him of the power to do future mischief, or to deter others by his example." *S. v. Swindell,* 189 N. C., 151, 126 S. E., 417. By amendment or disability, yes, for they come within the purview of law enforcement, but why by example? Does the deterrence theory belong exclusively to the law of crimes? Whose duty is it to preach the gospel of fair dealing and to hold high the banner of righteousness? Does not a punitory judgment which is in excess of amendment, disability or expiation, and to the extent that it is rendered alone for example's sake, or solely as a warning to others, partake of atonement for society's neglect? Does nature exact such punishments for the violation of her laws? Is the good life no more than a refuge? But these are only meditative reflections, binding on no one, and of little value perhaps.

The defendant is entitled to a new trial, and it is so ordered.

New trial.

STATE OF NORTH CAROLINA ON RELATION OF D. L. BOULDIN v. W. A. DAVIS.

(Filed 20 November, 1929.)

1. **Elections I a—It is not necessary that relator in action to try title to office be candidate for office contested.**

   It is not required that a resident taxpayer and qualified voter of a municipality be a competitor of the present incumbent in an election to the municipal office in order for him to be a relator with the approval of the Attorney-General of the State in proceedings in the nature of *quo warranto.* C. S., 869, 870, 871.

2. **Same—Superior Court has original jurisdiction of action in nature of quo warranto to try title to office.**

   The jurisdiction of the courts to entertain action in the nature of *quo warranto* existed at common law and does not exclusively rest by statute, and where a municipality is authorized by certain provisions in its charter to determine the result of an election held for the election of its own officers, recount of the votes, etc., it does not oust the jurisdiction of the Superior Court to entertain original jurisdiction of the proceedings in the nature of *quo warranto* to try the disputed title to the office of one of its officials. C. S., 869. The provisions of the Federal and State Constitutions having reference respectively to the rights of Congress and the State Legislature to determine the rights of contestants to seats in the respective bodies have no application.

3. **Same—In this case held: charter of city did not prescribe that action to try title to office be first brought before commissioners.**

   In this case *held:* that a provision in the charter of a municipal corporation giving to the city commissioners the authority and right to determine the question of a contested election of one of its officers did not attempt to deprive the Superior Court of its jurisdiction, or make it derivative or subordinate to the action of the municipal authorities, but at most to provide a cumulative remedy. As to whether the Legislature may by statute deprive the courts of their original jurisdiction in proceedings in the nature of *quo warranto* to determine title to office, *quære?*

APPEAL by defendant from *Shaw, J.,* 21 September, 1929. From GUILFORD. Affirmed.

The relator alleges that he is a resident, taxpayer, and qualified voter in Ward No. 2, in the city of High Point; that the defendant is a resident and citizen of High Point; that the Attorney-General has granted the relator leave to bring this action; that an election of councilmen was held in the city on 7 May, 1929, the two candidates in Ward No. 2 being the defendant and T. C. Johnson; that although Johnson received a majority of the votes cast in the election, the registrar and judges of election declared the defendant elected to the office; and that the defendant has unlawfully assumed to qualify and has usurped the office and is unlawfully receiving the fees and emoluments.

The defendant demurred *ore tenus* to the complaint on the following grounds: 1. The charter of the city (sec. 31, subsec. 5) is a public act and the courts must take judicial notice of its provisions, among which is this: "It (the city council) shall be the judge of the qualification and election of its members, and shall have authority to recount the votes for any of its members and to correct the result which may have been declared in the event notice of a contest shall be duly given." 2. The city council is a *quasi*-judicial body, having sole jurisdiction of this inquiry, or, in any event, primary jurisdiction, and that the Superior Court has no jurisdiction until the plaintiff has prosecuted his cause before the city council. 3. That the complaint fails to state a cause of action in that it does not allege that the plaintiff prosecuted his cause before the city council before instituting this action.

The demurrer was overruled and the defendant excepted and appealed.

King, Sapp & King, Shuping & Hampson and Hoyle & Harrison for plaintiff.

T. J. Gold, Z. I. Walser, Clifford Frazier and Sidney S. Alderman for defendant.

ADAMS, J. The relator does not allege that he is entitled to the office or to any of its emoluments; but this allegation is not essential to the maintenance of the action. A civil action in the nature of *quo warranto* may be brought by the Attorney-General in the name of the State upon his own information or upon the complaint of a private party. C. S., 869, 870. A relator need not be a contestant for the office, but he must be a citizen and taxpayer within the jurisdiction over which an incumbent of the contested office exercises the functions prescribed by law. *Foard v. Hall,* 111 N. C., 369; *Hines v. Vann,* 118 N. C., 3; *Houghtalling v. Taylor,* 122 N. C., 141; *Jones v. Riggs,* 154 N. C., 281; *Midgett v. Gray,* 158 N. C., 133.

The charter of the city of High Point provides, not only that the city council shall be the judge of the qualification and election of its members, but that the charter shall be deemed a public act, judicial notice of which shall be taken in all courts without the necessity of pleading the act or reading it in evidence.

This is a proceeding in the nature of *quo warranto*, instituted in the Superior Court without reference to the prosecution of any asserted remedy before the city council or any allegation of an application to the city council to adjudge the election. The appellant contends that by virtue of the charter the trial court was affected with judicial notice of these facts, and that the right of the city council to judge of the election and qualification of its members excludes or ousts the jurisdiction of the Superior Court.

On this point we are referred by the appellant to *Britt v. Board of Canvassers*, 172 N. C., 797, and to *Alexander v. Pharr*, 179 N. C., 699, in the first of which it was held that Article I, sec. 5, of the Constitution of the United States withdraws from the courts and vests in Congress the power to judge of the election and qualification of its own members, and in the second of which it was held that similar power is conferred upon the General Assembly of North Carolina. Constitution, Art. II, sec. 22. Just as Congress is one of the coördinate branches of the Federal Government, the General Assembly is one of the coördinate branches of the State Government. The doctrine upon which rests the separation of executive, legislative and judicial powers is thus expressed in *Kilbourn v. Thompson*, 103 U. S., 168, 190, 26 Law Ed., 377, 387: "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether State or National, are divided into the three grand departments of the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

This doctrine has no application to the point in question. But the appellant contends that there is no common-law jurisdiction in any courts under the Code of Civil Procedure to try title to an office and that the existing remedy is purely statutory, *quo warranto* and information in the nature of *quo warranto* having been abolished. C. S.,

869. The writ of *quo warranto* was a common-law process. It was an original writ in the nature of a writ of right prosecuted at the suit of the king against one who usurped or claimed franchises or liberties to inquire of what right he claimed them. It fell into disuse and was supplied or superseded by an information in the nature of *quo warranto* which in its origin was "a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize it for the crown." 3 Bl., 263. It was subsequently applied to the purposes of trying the civil right, and was a "part of that mass of remedies for wrongs which was brought over to this country by the early English settlers. 22 R. C. L., 656; 32 Cyc., 1412; *Ames v. Kansas,* 111 U. S., 449, 461, 28 Law Ed., 482, 487; *Brooks v. State,* 51 L. R. A. (N. S.), 1126; *S. v. Hardie,* 23 N. C., 42; *Brown v. Turner,* 70 N. C., 93; *S. v. Norman,* 82 N. C., 687.

There can be no doubt that the Superior Court has jurisdiction of actions to try the title to an office. 1 Rev. Sts., ch. 97; Rev. Code, ch. 95; Battle's Rev., 234; Code, secs. 603, 616; Revisal 1905, secs. 826, 833; C. S., sec. 869, *et seq.* It was said in *Saunders v. Gatling,* 81 N. C., 298, that although the proceeding by information in the nature of *quo warranto* has been abolished, the remedy to be pursued when the controversy involves the validity of an election to public office is by a civil action in the nature of a writ of *quo warranto*—from which the conclusion may be drawn that the statutory change relates more directly to the form than to the substance of the action. It is not necessary to decide, and we express no opinion on the question, whether under our Constitution an amendment to the charter of a municipal corporation can deprive the Superior Court of its jurisdiction in actions of this character. *Rhyne v. Lipscombe,* 122 N. C., 650. In other jurisdictions there is an apparent conflict of authority. 20 C. J., 215, sec. 273(2); 9 R. C. L., 1160, sec. 150; *Love v. Cosgrave,* 26 L. R. A. (N. S.) (Neb.), 207, and annotation. Many of the cases are cited in the well considered briefs of counsel, but an effort to differentiate or to reconcile them would be a superserviceable task. We believe the better rule to be the one given by two of the leading textwriters on Municipal Corporations. Dillon says: "It is not unusual for charters to contain provisions to the effect that the common council or governing body of the municipality 'shall be the judge of the qualifications' or 'of the qualifications and election of its own members,' and of those of the other officers of the corporation. What effect do such provisions have upon the jurisdiction of the Superior Courts? The answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the State on the subjects of contested elections and *quo warranto.* The principle is, that the jurisdiction of the court remains unless it appears with unequivocal certainty that the legislature intended to take it away. Language like that quoted above will not ordinarily have this effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one." The same principle is maintained by McQuillin: "Thus a charter provision that the council 'shall judge of the qualifications, election and return of the members thereof,' it has been held, does not make the council the final judge, and, hence, the courts may determine the right to the office of councilman on an information in the nature of *quo warranto*. The jurisdiction of the court remains unless it clearly appears that the intention was to take it away." 2 Municipal Corporations (2 ed.), sec. 491. We find in the charter no "clear intent" to deprive the Superior Court of its jurisdiction in the premises. Conceding, without deciding, the power of the Legislature to confer exclusive jurisdiction upon the city, we conclude that the amendment construed most favorably for the appellant is cumulative only, and that the Superior Court had jurisdiction to proceed to judgment. See *S. v. Carter,* 194 N. C., 293; *Harkrader v. Lawrence,* 190 N. C., 441. We are likewise of opinion that the city council has no primary jurisdiction and that the jurisdiction of the Superior Court is not merely supervisory of matters growing out of the council's departure from or transgression of the powers alleged to have been conferred. The original jurisdiction of the Superior Court has not been taken away, and its exercise cannot be subordinated to the action of the city council. The judgment overruling the demurrer is

Affirmed.

TALLASSEE POWER COMPANY v. MARY B. PEACOCK ET AL.

(Filed 20 November, 1929.)

1. **Appeal and Error A c—Upon overruling demurrer appeal lies exclusively to Supreme Court.**

Where a demurrer to a complaint in a civil suit on the ground of its insufficiency to state a cause of action has been overruled, the procedure for the defendant is to except and duly appeal to the Supreme Court, and where he has appealed, but has failed to prosecute it, he may not plead and again demur before another judge of the Superior Court at a subsequent term of court, the action of the former judge in refusing the motion being conclusive. C. S., 601.

2. **Pleadings D d—Upon overruling of demurrer defendant cannot demur again before another judge of Superior Court.**

Demurring *ore tenus* to the sufficiency of the complaint to state a cause of action after a former judge has refused the motion is in effect appealing from one Superior Court judge to another upon matters of law or legal inference which is the sole province of the Supreme Court under the provisions of our State Constitution, Art. IV, sec. 8.

3. **Same—Demurrer on ground that cause of action is not stated may be made at any time.**

Demurrer to the sufficiency of the complaint to state a cause of action may be made at any time, though answer has been filed, in the Superior Court or in the Supreme Court, or the Supreme Court on appeal may take cognizance thereof *ex mero motu.* C. S., 518.

APPEAL by plaintiff from *Moore, J.,* at July Term, 1929, of DAVIDSON. Reversed.

Action for the specific performance of a contract to convey land.

From judgment sustaining defendant's demurrer *ore tenus* to the complaint, and dismissing the action, plaintiff appealed to the Supreme Court.

Raper & Raper and R. L. Smith & Sons for plaintiff.
Spruill & Olive for defendants.

CONNOR, J. This action was begun in the Superior Court of Davidson County on 8 December, 1927. On 9 December, 1927, plaintiff filed its duly verified complaint. On 4 January, 1928, defendants demurred in writing to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. This demurrer was overruled by Stack, J., at May Term, 1928, and defendants were allowed sixty days within which to answer the complaint. Defendants excepted to the order overruling the demurrer and gave notice of their appeal to the Supreme Court. The appeal was not perfected. The order of Judge Stack has not been reversed on appeal by this Court and is, therefore, conclusive in the Superior Court of the question presented by the demurrer, in writing, to wit: Whether the facts stated in the complaint are sufficient to constitute a cause of action upon which plaintiff is entitled to the relief prayed for. C. S., 601.

On 9 June, 1928, defendants filed an answer to the complaint in which they denied the material allegations thereof. On 18 March, 1929, by leave of court obtained at February Term, 1929, defendants filed an amended answer, in which after again denying the material allegations of the complaint, they alleged matters in further defense of plaintiff's recovery in this action. Plaintiff filed a reply to the amended answer, in which it denied the allegations of the answer.

The action came on for trial on the issues raised by the pleadings at July Term, 1929, before *Moore, J.,* and a jury. After the jury had been empaneled and after the pleadings had been read, defendants demurred *ore tenus* to the complaint, and moved that the action be dismissed, on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action. The demurrer *ore tenus* was sustained and the motion that the action be dismissed was allowed. Plaintiff excepted to the judgment, sustaining the demurrer *ore tenus,* and dismissing the action, and appealed to this Court, contending that there was error in the judgment.

Ordinarily, an objection that the complaint filed in a civil action does not state a cause of action may be taken advantage of at any time. The objection may be made in writing before answer filed, or it may be made orally after answer filed. The right to demur to the complaint on that ground, or on the ground that it appears upon the face of the complaint that the court is without jurisdiction of the cause of action alleged in the complaint, is not waived by the filing of an answer. C. S., 518. In either case, notwithstanding answer filed, the defendant may demur *ore tenus* in the Superior or in the Supreme Court. The Supreme Court of its own motion may take notice of the insufficiency of the complaint, or of the lack of jurisdiction, and dismiss the action upon either ground. *Lassiter v. Adams,* 196 N. C., 711, 146 S. E., 808; *McDonald v. MacArthur,* 154 N. C., 122, 69 S. E., 684; *Garrison v. Williams,* 150 N. C., 674, 64 S. E., 783.

Where, however, as in the instant case, before answer filed defendant demurred in writing to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action and the demurrer on this ground is heard by a judge of the Superior Court, and not sustained by him, and thereafter the defendant filed an answer to the complaint, the defendant may not present the same question for decision to another judge of the Superior Court, presiding at a subsequent term of the court, by a demurrer *ore tenus.* The order of the judge overruling the written demurrer is appealable. *Shelby v. R. R.,* 147 N. C., 537, 61 S. E., 377. The appeal therefrom must, however, be taken to the Supreme Court which alone has jurisdiction to review the decision of the judge of the Superior Court. *Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501. It is well settled that "no appeal lies from one Superior Court judge to another." *May v. Lumber Co.,* 119 N. C., 96, 25 S. E., 721. It was error for Judge Moore, presiding at a subsequent term of the court to hear and determine defendants' demurrer *ore tenus,* where the same question thereby presented had been decided by Judge Stack at a former term of the court. Defendants' demurrer *ore tenus* in this case was in effect an appeal from Judge Stack to Judge Moore, both of whom are judges of the Superior Court. The latter was without power to review the decision of the former. The power to review the decision of a judge of the Superior Court, upon a matter of law or legal inference, on appeal, is vested by the Constitution of this State exclusively in the Supreme Court. Const. of N. C., Art. IV, sec. 8.

Upon consideration of the allegations of the complaint, we are of opinion that the facts alleged therein are sufficient to constitute a cause of action, and that in any event it was error to sustain the demurrer *ore tenus* and to dismiss the action. The judgment is

Reversed.

R. B. BROWN, TRADING AS SALEM STEEL COMPANY, v. MRS. MINNIE K. BROADHURST AND A. F. NANCE.

(Filed 20 November, 1929.)

1. **Jury C a—In this case held: defendant had preserved right to trial by jury and refusal of jury trial was reversible error.**

In an action to enforce a lien for material furnished the contractor and used in the construction of the owner's building when the defendant owner excepts to the order of reference and preserves her right to trial by jury throughout, and tenders exceptions to the referee's findings with demand in apt time for a trial of the facts by jury: *Held*, error for the trial court to confirm the referee's report and deny defendant's right to a trial by jury.

2. **Contracts F c—Instruction in effect placing burden of proving breach of contract on both parties is reversible error.**

Where in the action by a material furnisher to enforce a statutory lien against the owner of a building the question is involved as to whether the defendant had breached her contract with her contractor, the submission of two issues to the jury, one as to the owner's breach and the other as to the contractor's breach of the same contract, under instructions placing the burden of proving one of these issues on the defendant and the other on the plaintiff, is reversible error, the effect being to put the issue as to defendant's breach upon both parties at the same time. As to the question of waiver of the defendant's breach *quære?* but not decided.

APPEAL by defendant, Mrs. Minnie K. Broadhurst, from *Shaw* and *Moore, JJ.*, at April and August Terms, 1929. From GUILFORD.

Civil action to recover for materials furnished by plaintiff and used by A. F. Nance, contractor, in the construction of a building for Mrs. Minnie K. Broadhurst, owner, on a lot in the city of High Point, and to enforce a lien upon said property.

Upon denial of liability, and issues joined, the jury, at the April Term, 1929, Superior Court of Guilford County, Hon. Thomas J. Shaw, judge presiding, returned the following verdict:

"1. Did the plaintiff give to the defendant, Minnie K. Broadhurst, owner of the lands described in the complaint, notice of his alleged claim against the defendant, A. F. Nance, contractor, as alleged in the complaint and as prescribed by statute? Answer: Yes.

2. If so, did the defendant make payment to the contractor after receiving said notice, and if so, in what amount? Answer: $1,147.60.

3. Did the defendant, Nance, breach the contract, as alleged in the pleadings? Answer: No.

3½. If so, what amount, if any, did Mrs. Broadhurst expend to complete the said building in accordance with the contract with the defendant, Nance? Answer: ....

4. Did the defendant, Mrs. Broadhurst, breach the contract, as alleged in the pleadings? Answer: Yes.

5. What amount, if any, is the defendant, Nance, indebted to the plaintiff? Answer: $1,208, with interest from 28 February, 1928."

The answer of the jury to the second issue was set aside, and a reference ordered to state an account between the owner and the contractor. The owner objected and demanded a jury trial as to said accounting, and at the same time preserved her exceptions to the validity of the trial on the other issues, upon which judgment was entered in favor of the plaintiff.

Upon exceptions duly filed to the report of the referee, issues tendered, and a jury trial again demanded, the matter came on for hearing before Hon. Walter E. Moore, judge presiding, at the August Term, 1929, Superior Court of Guilford County. The request for a jury trial was denied, all exceptions to the report of the referee were overruled, and from the judgment confirming said report, as well as from the judgment entered at the April Term, the defendant, Mrs. Minnie K. Broadhurst, appeals, assigning errors.

Archie Elledge and Frazier & Frazier for plaintiff.
D. H. Parsons for defendant Broadhurst.

STACY, C. J., after stating the case: We think it was error for the trial court to confirm the report of the referee at the August Term, without first submitting an appropriate issue to the jury, as the defendant had duly preserved her right to have the controverted matter determined in this way. The appealing defendant objected and excepted to the order of reference at the time it was made, and, on the coming in of the report, she filed exceptions thereto in apt time, properly tendered an appropriate issue and demanded a jury trial on the issue tendered and raised by the pleadings. This preserved her right to have the matter submitted to a jury. *Jenkins v. Parker,* 192 N. C., 188, 134 S. E., 419; *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16; *Driller Co. v. Worth,* 117 N. C., 515, 23 S. E., 427.

We are also of opinion that error was committed on the trial at the April Term. The third and fourth issues, above set out, refer to the same contract—the building contract between the owner and the contractor. The burden of proof with respect to the third issue was placed upon the defendant, Mrs. Broadhurst, while the plaintiff was given the laboring oar on the fourth issue. Thus, it would seem that the burden of proof, with respect to the alleged breach of the building contract, was put upon both parties at the same time. This was error. *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398.

Furthermore, it may be doubted as to whether the record contains evidence sufficient to support a finding that the contract was breached by Mrs. Broadhurst. True, she stopped the laborers and declined to pay a bill of $98 on the morning of 11 February, 1928, but this was adjusted later in the day through the efforts of the bondsman, with the understanding that the work would continue, and on the following Monday a check for $220 was given to the contractor to cover a draft for materials. As to whether this amounted to a waiver of any prior deviation from the contract, does not seem to have been submitted to the jury, and we are content to place our present decision on the error in the charge relative to the burden of proof.

New trial.

O. W. HOLMES v. CITY OF FAYETTEVILLE.

(Filed 20 November, 1929.)

1. **Municipal Corporations B a—General powers of municipal corporations.**

   The powers of a municipal corporation are those granted in express words or necessarily implied thereby, incident or essential to the declared objects and purposes of the corporation as ascertained from the interpretation of its charter, and special and general statutes and the organic law.

2. **Municipal Corporation B d—In this case held: city had authority to furnish electric current to those within three mile zone.**

   Where a city has its own poles and electric wires for the supplying of electric current supplied under contract with a private corporation to supply it, with the statutory authority to furnish for profit individuals, corporations, etc., within the limits of the city and a territory extending three miles in all directions therefrom, it is not inhibited by the State or Federal Constitutions from supplying such current to another corporation for the purpose of furnishing electricity to consumers within the city limits of its extended territory when such service does not affect the service rendered in this respect to its own citizens, and tends to diminish and not to increase the rate of taxation of its citizens, and this is not objectionable on the ground that it does not contribute to the fulfillment of its municipal functions as an agency of the State Government for local purposes.

3. **Same—Legislature may grant city power to sell electricity within three mile zone.**

A municipality has the power to purchase electricity for its own use and the use of its citizens, and where it is authorized by general and special statutes to purchase current from a power company and to resell and distribute it at a profit to its citizens and to those within a three-mile zone therefrom, the grant of power to do so is effective in law under the authority of the Legislature to grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established unless prohibited by the organic law. Article VIII, section 4; C. S., 2807, 2808, as amended; Private Laws 1929, ch. 190.

4. **Taxation A a—Where expansion of city's power lines is to be paid for out of profits therefrom submission to voters is unnecessary.**

Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of our State Constitution, Art. VII, sec. 7, nor is it in violation of the Fourteenth Amendment to the Federal Constitution.

5. **Statutes A e—Where authority is given city by special and general statute Art. VIII, sec. 1 does not apply.**

The provisions of Article VIII, section 1, of our State Constitution, prohibiting the Legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the Legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined.

THIS was a motion to continue to the hearing an order restraining the defendant from paying out any of its funds for the purpose of erecting and maintaining an electric transmission line beyond its corporate limits and furnishing an electric current to persons, firms and corporations outside the corporate limits, heard by *Cranmer, J.*, at Chambers, on 26 March, 1929. The temporary restraining order was dissolved and the plaintiff excepted and appealed upon error assigned.

In 1905 the General Assembly amended the charter of the defendant by creating a "Public Works Commission," to consist of three members, who should have charge, control, supervision, and management of all the defendant's public utilities, including waterworks, sewerage, electric light plant, etc., and who should have power and authority to make necessary contracts for the construction, repair, alteration, enlargement, and proper management of any of said public utilities, and to fix rates for their use. Private Laws, 1905, ch. 311. In 1925 this act and other acts were amended and the corporate powers of the defendant were enlarged. Private Laws 1925, ch. 28. By these amendments the defendant was authorized and empowered to purchase, conduct, own, lease, and acquire utilities and to provide for all things in the nature of public works, and to acquire, establish, and operate waterworks, electric lighting systems, etc. Section 3 of Article 2, says that all ordinances enacted in the exercise of the police power for sanitary purposes or the protection of the defendant's property shall, unless otherwise provided by the aldermen, apply with equal force to the territory outside the city limits within one mile in all directions from the corporate boundaries. Article 3 provides for acquiring by purchase or condemnation rights of way, easements, and privileges for water, sewer, and electric light systems either within or outside the city, and section 7 of Article 7, for the supervision of electric light, water, and sewerage plants. On 16 March, 1929, section 3, Article 2, of the act of 1925, *supra,* was amended by adding thereto the following: "Sec. 4. That said city of Fayetteville be, and it is hereby authorized and empowered in its discretion, to extend, construct, maintain, and operate its water, sewerage, and electric light lines and systems for a distance of not exceeding three miles in all directions beyond the corporate limits of said city as the same now exist or may hereafter be established; and to make reasonable charges for the use of such utilities." All laws in conflict with the act were repealed. Private Laws 1929, ch. 190.

"The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens," etc. C. S., 2807. This statute was amended in 1929 by inserting after the word "citizen" the following: "And to any person, firm, or corporation desiring the same outside the corporate limits, where the service is available." Public Laws 1929, ch. 285. This act amends C. S., 2808, by adding the following: "*Provided, however,* that for service supplied outside the corporate limits of the city, the governing body, board, or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits, with the same exemption from liability by the city or town as is contained in section two thousand eight hundred seven."

Brooks, Parker, Smith & Wharton and C. Murchison Walker for plaintiff.

Robinson, Downing & Downing and Nimocks & Nimocks for defendant.

ADAMS, J. The defendant has no plant of its own for producing and furnishing electricity as a public utility, but it owns and maintains a system of poles, wires, and appliances for transmitting and delivering electricity to persons, firms, and corporations within the city. Some years ago it made a contract with the Carolina Power and Light Company, which is now in effect, for the purchase of an electric current for the use of the city and for resale or redistribution within the corporate limits and within adjacent territory distant not more than three miles from the corporate boundaries. The contract is to continue ten years from 10 September, 1924. The company is to supply all the electric power requirements of the city not to exceed certain electrical horsepower. The city shall not sell or permit others to use power supplied under the contract except when expressly provided for in the rate classification under which the service is furnished, and the company shall have the right to serve only such power customers within the area as shall require an installation aggregating not less than twenty-five horsepower.

After the creation of the Public Works Commission, the city extended its light and water systems beyond the corporate limits, thereby supplying a Normal School, a Women's Home, and various individuals outside the city with light and water, and at the commencement of this action was engaged in constructing lines for selling electricity to persons and corporations outside the city limits, but within the three-mile zone. It intends, unless restrained, to complete this work. For more than ten years it has owned and operated transmission lines beyond the corporate boundaries, by which, it is alleged, electricity has been sold and is now sold to nonresidents at a profit.

Some time ago the plaintiff put up poles and lines outside and within less than three miles of the city boundaries, and the city furnished meters and electricity to persons using these lines under an agreement with the plaintiff; and it is now the purpose of the city to abide by its agreement if the plaintiff's lines are maintained in such way as to enable the defendant to provide reasonable service to its customers.

The plaintiff recently conveyed his transmission lines to the Holmes Electric Company, Inc., and this company soon after the conveyance applied to the Carolina Power and Light Company for the purchase of an electric current for resale or redistribution to persons and corporations within and beyond the three-mile limit. The plaintiff's application was rejected by the Power and Light Company and its subsequent effort to secure from the Superior Court a writ of mandamus to compel an acceptance of its application was denied. *Holmes Electric Co., Inc., v. Carolina Power and Light Co., post,* 766.

The relief sought by plaintiff in this action is a perpetual injunction to restrain the defendant from using its funds to erect and maintain a line for transmitting an electric current to persons, firms, or corporations outside the boundaries of the city. In dissolving the restraining order the judge determined the action upon its merits and rendered a final judgment. *Lutterloh v. Fayetteville,* 149 N. C., 65. This judgment the plaintiff assails on the ground that the defendant has no legal right to engage in a private enterprise beyond its corporate limits and because the act of 1929 purporting to grant the power was enacted in violation of the State and Federal Constitutions.

The plaintiff specifically rests his right to relief on two propositions, the first of which is this: A municipality which is not engaged in the manufacture of electricity, but is supplied an electric current from an electric power company, cannot engage in the business of selling such electric current to inhabitants outside the boundaries, where its activities outside its corporate limits in no way contribute to a fulfilment of its municipal functions or duties to the citizens within its boundaries.

The powers of a municipal corporation are those granted in express words, those necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes of the corporation. 1 Dillon (5 ed.), sec. 237. The sources of its powers are its charter, special acts, general statutes, and the organic law. 1 McQuillin (2 ed.), 363.

The dual capacity or twofold character possessed by municipal corporations is governmental, public, or political, and proprietary, private, or *quasi*-private. In its governmental capacity a city or town acts as an agency of the State for the better government of those who reside within the corporate limits, and in its private or *quasi*-private capacity it exercises powers and privileges for its own benefit. *Scales v. Winston-Salem,* 189 N. C., 469. "In its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to the property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it, are omnipotent." 1 Dillon (5 ed.), sec. 109, quoted in *Asbury v. Albemarle,* 162 N. C., 247, 253.

The general rule is that a municipal corporation has no extra-territorial powers; but the rule is not without exceptions. The Legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation. *S. v. Rice,* 158 N. C., 635; *C. P. & P. Co. v. Chicago,* 88 Ill., 221. If a municipality owns and operates a water or lighting plant and has an excess of water or electricity beyond the requirements of the public, which is available for disposal, it may make a sale of such excess to outside consumers as an incident to the proper exercise of its legitimate powers. 3 Dillon (5 ed.), sec. 1300; *Dyer v. City of New Port* (Ky.), 94 S. W., 25; *Muir v. Murray City* (Utah), 186 Pac., 433; *Sibley v. Electric Co.* (Iowa), 187 N. W., 560. The excess may be sold although the city, instead of owning the plant, gets its supply by contract. *Riverside Ry. Co. v. Riverside,* 118 Fed., 736.

In the case before us the record does not disclose the exercise of the police power or the sale of a surplus current. The direct question is whether the defendant is authorized to sell electricity to persons and corporations outside its limits when the electric current is furnished by the Power and Light Company in pursuance of the contract between these parties.

We think there can be no question as to the defendant's right to purchase electricity for its own use and for the use of its inhabitants. Private Laws 1925, ch. 28, Art. 2, sec. 1; Pond on Public Utilities, sec. 54. It is equally clear that without legislative authority the defendant would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to nonresidents of the city. *City of Paris v. Sturgeon,* 110 S. W. (Tex.), 459; *City of Sweetwater v. Hamner,* 259 S. W. (Tex.), 191; *Mayor, etc., v. Dunlap,* 94 S. E. (Ga.), 247; *Mulville v. San Diego,* 192 Pac. (Cal.), 702. This situation presents the two questions whether such legislative authority has been granted and if it has whether the grant is effective in law. The answer to the first is not in doubt. The recent amendment to the defendant's charter provides: "Sec. 4. That said city of Fayetteville be, and it is hereby authorized and empowered, in its discretion, to extend, construct, maintain and operate its water, sewerage, and electric light lines and systems for a distance of not exceeding three miles in all directions beyond the corporate limits of said city as the same now exist or may hereafter be established; and to make reasonable charges for the use of such utilities." Private Laws 1929, ch. 190. At the same session of the General Assembly, C. S., 2807, was amended by authorizing a city to furnish water and lights, not only to its citizens, but "to any person, firm or corporation desiring the same outside the corporate limits where the service is available." Public Laws 1929, ch. 285. Section 2 of this chapter adds to C. S., 2808, the following: "*Provided, however,* that for service supplied outside the corporate limits of the city, the governing body, board or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits, with the same exemption from liability by the city or town as is contained in section two thousand eight hundred and seven."

Now, as to the second question. The Constitution requires the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages. Art. VIII, sec. 4. In *Perry v. Commissioners,* 148 N. C., 521, it is suggested that by inadvertence this section was given an improper placing in Article VIII instead of Article VII; but without regard to its place in the Constitution the section contains, not only a grant of power to the Legislature, but the imposition of a duty to provide by general laws for the organization of municipal corporations. It has often been said that such corporations are mere instrumentalities of the State for the more convenient administration of local government. They are creatures of the Legislature, public in their nature, subject to its control, and have only such powers as it may confer. These powers may be changed, modified, diminished, or enlarged, and, subject to constitutional limitations, conferred at the legislative will. There is no contract between the State and the public that a municipal charter shall not at all times be subject to the direction and control of the body by which it is granted. *Wood v. Oxford,* 97 N. C., 228; *Lilly v. Taylor,* 88 N. C., 490; *Wharton v. Greensboro,* 146 N. C., 356; *Lutterloh v. Fayetteville, supra; Cabe v. Board of Aldermen,* 185 N. C., 158; *Martin v. Greensboro,* 193 N. C., 573.

The Constitution prohibits a city from contracting any debt, pledging its faith, loaning its credit, or levying any tax, except for necessary expenses, unless by the vote of a majority of the qualified voters. Article VII, section 7. The voters have not given their approval to the proposed enterprise; but the city does not purpose to disregard either of these constitutional inhibitions. It intends to use only such available funds as it has, and such as it will receive as the profits of the business. This course was pursued in the erection of a building in the city of Durham and was approved by this Court; but the auditorium was in the city and was intended for a public purpose. *Adams v. Durham,* 189 N. C., 232. In *Briggs v. City of Raleigh,* 195 N. C., 223, it was held that a State fair is a public undertaking and that a donation out of the funds of the city, approved by a majority of the qualified voters, could lawfully be made for retaining the fair outside the corporate limits, but within the vicinity of the city.

Neither of these cases is decisive of the present appeal. The defendant contends that as the Constitution confers upon the General Assembly power to provide by general laws for the organization of cities, towns, and villages, the legislative branch of the government may grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established, unless prohibited by the organic law. The controlling principle is that the exercise of powers for the private advantage of a city is subject to the same rules that govern individuals and private corporations, and that the courts will not interfere with the power to contract, especially when expressly conferred, unless it contravenes some fundamental principle or conflicts in some way with the organic law. 43 C. J., 235, sec. 233; *Henderson v. Young,* 83 S. W. (Ky.), 583; *Coldwater v. Tucker,* 24 A. R. (Mich.), 601; *Pittsburgh v. Bruce,* 27 At. (Penn.), 854. The contract between the defendant and the Power and Light Company, is limited in point of duration; and under its terms light can be furnished only by the defendant to those within the three-mile zone.

The appellant's second proposition is this: The Legislature of North Carolina cannot, by special act, constitutionally confer upon the city of Fayetteville the power to extend its electric power lines beyond its corporate limits and to furnish electricity to inhabitants beyond the territory embraced in these boundaries.

It is contended that the act amending the charter of the defendant is in violation of Article VIII, section 1, of the Constitution: "No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed, and the General Assembly may at any time by special act repeal the charter of any corporation."

It has been held that this section applies only to private or business corporations and not to those of a public or *quasi*-public nature, such as cities, towns, and counties. *Kornegay v. Goldsboro,* 180 N. C., 441. A municipality furnishing water or light renders service for a public purpose, and the fact that the water or service is furnished for individual consumption or the use of the inhabitants does not detract from the public service. Private purposes may be served incidentally, but this does not destroy the public character of the corporation or municipality. 3 Dillon (5 ed.), sec. 1300. Even if the amendment be construed as a private act the appellant's objection would not be fatal to the defendant's position for the reason that the Legislature has enacted general statutes, applicable to all cities and towns, which in effect confer the same powers given by the amendment to the charter.

In our opinion neither the amendment to the charter of the city nor the statutes amending the general laws to which we have referred are in conflict with the Fourteenth Amendment of the Federal Constitution, upon the facts appearing in the record, in that, by means of levying a tax, the taxpayer's money and property will be taken from him and applied to purposes outside the city limits. The theory on which the defendant's action is based is not that of taxing the inhabitants of the city for extra-territorial purposes, but the maintenance of its lines beyond the corporate limits out of the profits arising from the business within the three-mile limit. If the defendant should attempt to pledge the faith of the city or to contract a debt or to levy a tax for an enterprise conducted within the designated territory, the taxpayer would have ample remedy; but so long as the defendant's action is not in breach of any constitutional provision we do not perceive why it may not be justified by legislative sanction. The judgment is

Affirmed.

CITY OF GREENSBORO v. J. C. BISHOP ET AL.

(Filed 20 November, 1929.)

1. **Eminent Domain C d—On appeal it must be shown that levy of assessments was fraudulent, arbitrary or confiscatory.**

   Where assessments for special benefits against property abutting a street sought to be improved have been levied by the commissioners and regularly confirmed by the municipal governing body in accordance with statutory provisions, the action of the commissioners is ordinarily conclusive, and the owner of the property so assessed is not entitled to have an issue submitted to a jury to fix the amount of such assessment to be charged against his property in the absence of an allegation of bad faith, or arbitrary conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or gross injustice, or that the assessments were confiscatory, and his appeal without such allegations or evidence supporting them will be dismissed.

2. **Eminent Domain C b—Cross-examination of assessor as to amount allowed other adjacent owners held competent.**

   Where on appeal from the levy of assessments for street improvements involving also the issue of compensation for land taken in condemnation proceedings, it is competent for the owner of the land, for the purpose of impeachment, to cross-examine the city's witness, an appraiser in the proceedings, as to the amount allowed other adjacent owners in the same proceedings when a sufficient similarity as to the comparative value of the lands taken is shown.

APPEAL by city of Greensboro, plaintiff, petitioner, and J. C. Bishop, defendant, respondent, from *Shaw, J.*, April Term, 1929, of GUILFORD. *Both appeals affirmed.*

Robert Moseley and Andrew Joyner, Jr., for plaintiff, petitioner.
A. C. Davis and Frazier & Frazier for defendant, respondent.

CLARKSON, J. This was a special proceeding brought by the city of Greensboro, plaintiff, petitioner, against J. C. Bishop, defendant, respondent, and others, to condemn certain land and create a special assessment district area to pay the cost of improvement on Bishop Street in the corporate limits of the city of Greensboro. Bishop Street extends one city block eastwardly from Elm Street to Church Street, and is one city block north from O. Henry Hotel. Bishop Street, at the time of filing the petition by interested property owners to improve same, was 18 feet wide between curbs, with sidewalks six feet wide on either side of the street. The petition provided that Bishop Street be widened to 34 feet between curbs with sidewalks 8 feet wide on either side of the street. The entire width of Bishop Street to be increased from 30 to 50 feet. To do this, it was necessary to widen Bishop Street: (1) to condemn certain lands of the defendant, respondent, J. C. Bishop; (2) to create a special assessment district to pay the cost of such improvements. See chapter 220, Public Laws of N. C., 1923; C. S., 2792 (Sup., 1924) (a) to (p) inclusive, "An act to incorporate the City of Greensboro," etc.; chapter 37, Private Laws of N. C., session 1923; chapter 107, Public Laws, Extra Session, 1924; chapter 217, Private Laws 1927.

It seems that the law in regard to the special proceeding in the present action was carefully complied with, in fact the regularity of the proceedings by defendant, respondent, Bishop, was admitted.

We will consider first defendant respondent's, J. C. Bishop's, appeal to the Supreme Court. He was assessed for special benefits alleged to have resulted to his property in the area of the special assessment district according to the benefits accruing from such improvement.

The question involved: May a dissatisfied property owner, upon appeal to the Superior Court from a benefit assessment charged against his property by the commissioners and regularly confirmed by a municipal governing body in a proceeding brought under the provisions of C. S., 2792(a), *et seq., supra,* in the absence of an allegation of *mala fides* or arbitrary conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or gross injustice, have an issue submitted permitting the jury to fix the amount of such benefit assessment, if any, to be charged against his property? We think not.

The statutes applicable: C. S., 2792(i), in part: "If any party to the proceedings shall be dissatisfied with the report of the commissioners, or the assessment levied by the said governing body, he may file exceptions thereto with the clerk of the Superior Court within ten days after the filing of said report with said clerk, or in the event the appeal be from the levying of the assessment by said governing body, within ten days after the confirmation of such assessment roll by such governing body, and the issues of fact and law raised before the clerk in the said proceedings and upon the said exceptions shall be transferred to the Superior Court for trial in like manner as provided in the case of other special proceedings pending before the clerk," etc. C. S., 2792(h); C. S., 2714.

The city of Greensboro, plaintiff, petitioner, does not deny that defendant, J. C. Bishop, respondent, had a right to appeal, but that Bishop's exceptions do not set forth sufficient grounds—in that the exceptions do not contain an allegation of *mala fides* or arbitrary conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or such gross injustice to the effect that the assessment was so excessive as to result in the confiscation of defendant respondent's property. It appears that the sole complaint of defendant, respondent, is based upon the contention that the assessment for benefits was excessive and his dissatisfaction with same.

When the matter came on for hearing on appeal in the Superior Court the plaintiff, petitioner, city of Greensboro, moved the court to overrule the exceptions of defendant, propounder, J. C. Bishop, and confirm the report of the city council on the ground that the exceptions did not set forth allegations sufficient to raise issues of fact to be submitted to the jury. The court below overruled the exceptions and confirmed the judgment of the city council, and in this we think there was no error.

It is contended by defendant, petitioner, that the language of the statutes allowing appeals referred to, *supra,* used the expressions: C. S., 2792(i) "dissatisfied with a report of the commissioners," etc. C. S., 2714, "If a person assessed is dissatisfied with the amount of the charge," etc. C. S., 2792(h), "If a person assessed is dissatisfied with the amount of the charge," etc. That these sections allow an appeal in all cases where there is dissatisfaction as to the amount of the benefits assessed by the person whose land is charged. We cannot so hold. The defendant, propounder, was given notice and a hearing as to benefits assessed under the statute 2792(g): "At the time appointed for the purpose, or to some other time to which it may adjourn, the governing body, or a committee thereof, must hear the allegations and objections of all persons interested who appear and make proof in relation thereto. The governing body may thereupon correct such assessment roll and either confirm the same or may set it aside and provide for a new appraisal of benefits in such proceeding pending before the clerk of the Superior Court."

In accordance with the statute, upon objection by defendant, propounder, after due consideration of the merits of same, the city council declined to overrule the report of the commissioners and passed the following resolution: "That the city council is of the opinion, and now finds as a fact, that each tract of land referred to in the commissioners' report of benefits is actually benefited by the improvement described in this proceeding, in the amount shown by said report and the said assessment roll."

The Legislature has fixed this method of procedure, giving notice and a hearing, and it has been repeatedly held that the decision of the body is ordinarily conclusive and the power is based on the right to tax and not eminent domain.

In *Kinston v. Wooten,* 150 N. C., at p. 299, it is said: "From this it would seem to follow that the right of imposing such burdens, unlike the power of general taxation, is not unlimited and without restraint, but may be in certain cases subjected to judicial scrutiny and control." At page 302: "It will thus be seen that, while the right of the court to interfere for the protection of the individual owner of property is recognized, its exercise can only be justified and upheld in rare and extreme cases, when it is manifest that otherwise palpable injustice will be done and the owner's rights clearly violated. This limitation arises of necessity in this scheme of taxation, for in its practical application it would well-nigh arrest all imposition of these burdens if each individual owner of property were allowed to interfere and stay the action of the officials on any other principle."

In *Atlanta v. Hamlein,* 96 Ga., 383, the following from that decision is approved in *Tarboro v. Staton,* 156 N. C., at p. 508: "It is inconsistent with the proper exercise of the taxing power, and would tend to manifest embarrassment of the public in the prosecution of these public improvements, if, upon every assessment, the lot owner were entitled to have the question judicially determined whether or not he was benefited by the proposed improvement. As to whether he was benefited or not is a question which should address itself to the discretion of the municipal authorities. Their judgment upon this subject is ordinarily, except in the most extreme cases, conclusive; but, as we have before stated, it is not allowable that the municipal authorities, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. If, therefore, in the levy of such assessments, the cost of the improvement be so disproportioned to the value of the estate sought to be improved as that the levy of the assessment amounts to a virtual confiscation of the lot owner's property, such assessment cannot be upheld as a legal or valid exercise of the power to tax for such improvements."

In *Felmet v. Canton*, 177 N. C., at p. 54, citing a wealth of authorities, speaking to the subject: "The right of municipalities to make these assessments for public-local purposes, when acting under legislative authority properly conferred, has been very broadly upheld in this State, extending to any of the recognized methods of procedure and apportionment and including both the front-foot rule as well as the creation of local assessment districts. Being, as it is, referred to the power of taxation, it is very largely a matter of legislative discretion, usually held to be conclusive as to the necessity for the improvement, and in respect to the method of apportionment as well as the amount it only becomes a judicial question in cases of palpable and gross abuse."

In *Anderson v. Albemarle*, 182 N. C., at p. 435: "The question of benefit is one of fact, and the governing board of a municipality, under legislative authority, is vested with the power to determine what lands will be benefited by the improvements, and their determination is conclusive upon the owner of the ground charged with the costs of the improvements except in rare cases." *Gunter v. Sanford*, 186 N. C., 456.

In *Durham v. Proctor*, 191 N. C., at p. 121, it is said: "The municipal authorities were fully empowered to establish the assessment district, and to assess the burdens in proportion to the benefits. . . . Ample provision is made for a hearing, and such was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or with *mala fides.*"

In *Butters v. Oakland*, 263 U. S., at pp. 164-5, it is said: "Ample provision is made for a hearing, and a hearing was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or fraudulently."

The principle cited in the above authorities has long been the law in this jurisdiction and the statutes allowing appeals for dissatisfaction with the amounts charged as special benefits have been in force, but the appeal applies only in such cases as where the exception charges *mala fides* or arbitrary conduct or wilful misconduct of the governing body, or abuse of discretion, or such gross injustice as to make the assessment of benefits confiscatory. None of these allegations were made by defendant, respondent, in his exceptions on appeal. The court below overruled the exceptions because the allegations were not made, therefore there were no issues to be submitted to the jury, and confirmed the judgment of the city council. In this we think there was no error.

The judgment of the court below on defendant, respondent Bishop's appeal is

Affirmed.

We will now consider plaintiff, petitioner, the city of Greensboro's appeal, to the Supreme Court:

J. C. Bishop, defendant respondent, owned a strip of land, approximately 20 feet wide, necessary to widen Bishop Street. The proceeding in which the land was condemned and the damages therefor fixed was brought under the provisions of chapter 220, Public Laws 1923 (C. S., 2792 a to p inclusive), as amended.

From the report of the commissioners awarding damages, duly confirmed in accordance with the statute, the defendant respondent, J. C. Bishop, gave the proper notice and appealed to the Superior Court on the ground that the award of damages was inadequate and setting forth the reasons.

The issue submitted to the jury in the Superior Court and their answer thereto was as follows: "What damages, if any, have resulted to the defendant's property by reason of the widening of Bishop Street and the taking of the strip of land approximately 20 feet wide? Answer: $4,576.65."

The court below rendered judgment, in part, as follows: "It is further ordered, adjudged and decreed, that the defendant, J. C. Bishop, recover of and from the city of Greensboro the sum of $4,576.65, and that the cost of this proceeding be taxed by the clerk against the city of Greensboro." Plaintiff, petitioner, city of Greensboro, moved to set aside the verdict and for a new trial. Motion overruled. Exception by the city of Greensboro. Judgment was signed as above set forth.

The plaintiff, petitioner, city of Greensboro, assigned as error: "The action of the court in permitting the witness, J. R. Cutchin, to testify as to the damage fixed by the commissioners for a lot other than the plaintiff's lot."

J. R. Cutchin was one of the three appraisers or commissioners appointed to assess the cost against the plaintiff, petitioner, city of Greensboro, for taking the strip of land 20 feet wide necessary for improving Bishop Street in the area designated. Upon appeal by defendant, respondent, J. C. Bishop, to the Superior Court on the ground of inadequacy of the damage, the Commissioner Cutchin was a witness in behalf of the city of Greensboro. The city of Greensboro contends that the question involved: Upon the hearing in the Superior Court of an appeal as to damage to A.'s land resulting from the condemnation of a part thereof, is it competent to impeach a witness, who has testified as to the amount of such damages, by showing that, as appraiser in the condemnation proceeding, he estimated the damages to B.'s land, part of which was condemned in the same proceeding, to be a larger amount than the damage to A.'s land, without first showing that both tracts were similarly situated and of similar character?

J. C. Bishop contends: That the questions were asked on cross-examination and that the court limited the evidence as follows: The court: "Gentlemen, this evidence about that corner lot is only admissible as tending to impeach the witness, not to show the damage to this lot, but simply as tending to impeach the witness." The respondent, Bishop, insisted throughout the trial that he had been allowed an inadequate sum for the strip of land condemned and taken for street purposes by the city of Greensboro, and appealed for that reason. He insisted that no uniform rule had been adopted and that the appraiser Cutchin, along with the other appraisers, had allowed a much higher rate for the property located at the corner of Bishop and Church streets than should have been allowed, and that much less had been allowed him than ought to have been allowed him.

In *Ayden v. Lancaster, ante,* 556, the subject of proximity and similarity of land to determine value standard was discussed. We repeat what Dean Wigmore said, speaking to the subject (Wigmore on Evidence, Vol. 1, 2nd ed., p. 1136, part section 718): "Hence, the question arises how far an acquaintance with value standards in one place will suffice when the value in question is of a thing in another place. The witness' competency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down." *Ayden v. Lancaster, supra,* at pp. 561-2.

In this character of evidence (value standards) no iron-clad rule can be laid down. The relevancy is largely with the court below, the probative force is for the jury. In the present case, the evidence adduced was on cross-examination and allowed for the purpose of impeachment.

Ruffin, J., in *S. v. Morris,* 84 N. C., at p. 763, speaking of cross-examination, says: "All trials proceed upon the idea that some confidence is due to human testimony, and this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this, because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth, and trials are appreciated in proportion as they furnish the opportunities for such critical examinations." *Milling Co. v. Highway Commission,* 190 N. C., 692.

It must be borne in mind that the witness, Cutchin, was one of the commissioners who signed the report and made the appraisal as to the value of Bishop's land taken by the city of Greensboro. When he as one of the commissioners appointed to appraise the land, he was then acting in the capacity of an impartial arbiter. He also was one of the appraisers of the Masonic lot. When he became a witness for the city of Greensboro he was subject to cross-examination as any other witness for the purpose of impeachment and to show bias. The Masonic lot was in the proximity, not exactly similar, but the difference testified to so that the jury had all the facts before them. If error, we cannot on the record hold it prejudicial or reversible.

We do not think the evidence in the present case, which was brought out on cross-examination, militates against the principle in the cases cited by plaintiff, petitioner, city of Greensboro. *Warren v. Makely,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361; *Belding v. Archer,* 131 N. C., 287; *Brown v. Power Co.,* 140 N. C., 333.

The judgment of the court below on plaintiff, petitioner, city of Greensboro's appeal, is

Affirmed.

CORA BOHANNON, BY HER NEXT FRIEND, MRS. A. E. BOHANNON, v. LEONARD-FITZPATRICK-MUELLER STORES COMPANY, INC.

(Filed 20 November, 1929.)

Negligence A c—Construction and condition of steps held not to constitute negligence in this case.

The owner of a store for the sale of merchandise is not an insurer of the safety of its customers or invitees therein, but is liable only for injuries resulting from failure to exercise reasonable care to provide for their safety while on the premises; and where there is evidence tending only to show that the plaintiff was injured while coming down the stairs of the store by a fall caused by her heel catching in a piece of metal strip two inches wide lying one-sixteenth of an inch above the wooden tread of the step, the tread being nine inches and the rise of the step eight inches, and the width of the stair being four feet, with a hand-railing on each side: *Held,* the injury could not have been reasonably anticipated, but resulted from an accident, and defendant's motion as of nonsuit should have been granted.

CLARKSON, J., dissenting opinion; STACY, C. J., concurring in dissent.

APPEAL by defendant from *McElroy, J.,* at September Term, 1929, of FORSYTH. Reversed.

Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant.

The negligence alleged in the complaint is the maintenance of a stairway in a building occupied by the defendant, for the use of the public, with steps which plaintiff alleges were negligently constructed.

On 1 March, 1929, defendant, a corporation engaged in the retail mercantile business, under a lease from the owner was in possession of a building in the city of Winston-Salem, N. C. It occupied said building and operated therein a store for the sale of dry goods. On the second floor of said building there was a "Beauty Parlor." The only means of access to said "Beauty Parlor" from the first or ground floor of said building was a stairway. By the terms of its lease, defendant had undertaken to maintain the said stairway in a safe condition for use by the patrons and customers of the "Beauty Parlor."

The steps of said stairway are constructed of wood. Each step has a tread of nine inches, and a rise of eight inches. Across the front of each step is a metal strip two inches wide. The surface of each of these metal strips as it lies upon the step is one-sixteenth of an inch higher than the surface of the step. Each of the metal strips extends over the next lower step in the stairway about an inch and three-fourths, and is curved back to the riser of said step. The purpose of the metal strips is to protect the edge of each step from wear, and thereby to provide for the safety of persons who use the stairway. The stairway is inside the building, and is about four feet wide. There is a hand-rail on each side of the stairway. From the first floor to the platform, which is between the first and second floors, there are eight or nine steps; from the platform to the "Beauty Parlor," which is in a balcony on the second floor, there are four steps.

On 1 March, 1929, the plaintiff was an employee of defendant. She had been in charge of the hosiery department, located on the first floor of the building, for five months. She had no duties as an employee of defendant which required her to ascend the stairway or to go to the second floor of the building. During the lunch hour of said day, while she was released from her duties as an employee, plaintiff ascended the stairway and went to the "Beauty Parlor" on the second floor as its patron or customer. After she had been served in the "Beauty Parlor," and while she was descending the stairway to the first floor, she fell and was injured. She testified as follows:

"On 1 March I was a customer of the "Beauty Parlor." After the work for which I had gone up there had been finished, I started to go down the steps. About five steps from the bottom of the stairway I fell. What caused me to fall was that the steel piece on the edge of the step caught in the heel of my left shoe. The steel piece was a fraction higher than the other part of the step—the wood part—and that caught the heel of my shoe, as I was coming down the stairway. I was holding to the banisters on either side of the steps. I was coming down carefully, as I knew that others had fallen on the stairway. As I stepped on this step, and was making another step, my heel caught on the steel piece which comes up a fraction above the wood, throwing me around. This was the cause of my injuries. I did not fall clean to the bottom of the stairway. I got up and sat on the step. Then everything went black to me. One of the employees in the store came and helped me to the back of the store."

All the evidence offered at the trial was to the effect that the metal strips on the steps in the stairway were about one-sixteenth of an inch higher than the wood, and that the tread of each step, including both the wood and the metal strip, is nine inches. One of plaintiff's witnesses, a carpenter of forty years experience, testified as follows:

"I was in that store a couple of times while they were building those steps, and I saw the steps three or four days ago. I didn't examine them very much, but had occasion to go up and down the stairway once or twice. To the best of my knowledge the steps in the stairway have a tread of about nine inches, and a rise of about eight inches. I judge that the metal strip is about two inches wide. That is the way they usually put them on. I never noticed whether the edge of the metal strip on each step was higher than the step back of it."

This action was begun and tried in the Forsyth County Court before Efird, J., and a jury. The issues submitted to the jury at the trial were answered as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by her own negligence, contribute to the injury as alleged in the answer? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000."

From judgment on the verdict, defendant appealed to the Superior Court of Forsyth County, assigning errors based on exceptions duly taken during the trial.

Upon the hearing of said appeal, in the Superior Court, defendant's exceptions were not sustained. The judgment of the County Court was affirmed.

From the judgment of the Superior Court, affirming the judgment of the County Court, defendant appealed to the Supreme Court.

W. L. Morris for plaintiff.
Ratcliff, Hudson & Ferrell for defendant.

CONNOR, J. The defendant on its appeal to this Court contends that there was error in the judgment of the Superior Court of Forsyth County, and that for this error the said judgment should be reversed. On its appeal from the judgment of the County Court to the Superior

Court of Forsyth County, defendant assigned as error the refusal of the County Court to allow its motion for judgment as of nonsuit, at the close of all the evidence, and in accordance with said motion to dismiss the action. This assignment of error was not sustained by the Superior Court. The judgment of the County Court was affirmed. The defendant excepted to the judgment of the Superior Court and appealed therefrom to this Court.

The defendant's contention that the evidence offered at the trial in the Forsyth County Court, viewed in the light most favorable to plaintiff, is not sufficient to sustain plaintiff's allegation that the injuries for which she seeks to recover damages by this action, were caused by the negligence of defendant, is thus presented to this Court. It is conceded that there was evidence tending to show that plaintiff's fall on the stairway in the building occupied by defendant was caused, as she testified, by the catching of the heel of her shoe by the metal strip on the edge of a step in said stairway, and that her injuries were caused by this fall. It is admitted that upon the facts of this case, defendant is liable to plaintiff for the damages which resulted from her injuries, if the said injuries were caused by the negligence of defendant in failing to maintain the steps of the stairway in a reasonably safe condition for use by patrons and customers of the "Beauty Parlor," located on the second floor of the building occupied by the defendant, under a lease from the owner. The question to be decided, therefore, is whether the defendant was negligent in maintaining the stairway with steps constructed as all the evidence tends to show the steps in the stairway were constructed by the owner of the building. The negligence alleged in the complaint is the maintenance by defendant of the stairway for use by the public, with steps which were negligently constructed, in that metal strips, two inches wide, are laid upon the steps, with the result that the surface of the said strips is higher than the surface of the remainder of the steps. All the evidence tends to show that the surface of the metal strips is one-sixteenth of an inch higher than the surface of the remainder of the steps.

With respect to the construction of the steps in the stairway, it should be noted that the tread of each step is nine inches, including the metal strip, thus leaving the distance from the edge of the step to the back of the step, or to the rise of the next step above, seven inches; also, that hand-rails were placed on each side of the stairway, which does not exceed four feet in width. The stairway is inside the building, and was constructed for use only by persons who have occasion to go from the first to the second floor, and from the second to the first floor of the building. Plaintiff contends that the construction of the steps in the stairway is negligent. She alleges that defendant was negligent in maintaining the stairway with the negligently constructed steps for use by patrons and customers of the "Beauty Parlor," in that defendant by the exercise of reasonable care could have foreseen that the edge of the metal strip on each of the steps, being higher than the remainder of the step, would probably catch the heel of the shoe of a person descending the stairway from the second floor, and cause such person to fall and be injured.

Plaintiff had been employed by defendant for five months prior to the day on which she was injured. During this time she worked only on the first floor. She had no duties by reason of her employment by defendant which required her to go up the stairway to the second floor of the building. She had, however, gone up to the "Beauty Parlor" twice during this time using the stairway for that purpose. She testified that she knew that others had fallen on the stairway. She did not testify, however, that any person other than herself had ever fallen on the stairway because the heel of the shoe of such person had been caught by the metal strip on any of the steps in the stairway, nor did she testify that defendant knew that any person had fallen on said stairway prior to the date on which she fell. There was no evidence tending to show that any person other than the plaintiff, while ascending the stairway, had fallen because his or her heel had been caught by one of the metal strips.

The liability of the owner or occupant of a building used as a store for the sale of merchandise to a customer or other invitee for damages resulting from injuries sustained while such customer or other invitee was in the building, and caused by some condition therein, is founded upon the principles on which the law of negligence is predicated. *Leavister v. Piano Co.*, 185 N. C., 152, 116 S. E., 405. The owner or occupant of the building is not an insurer of the safety of his customer or other invitee, while in the building. *Mullen v. Sensenbrenner* (Mo.), 260 S. E., 982, 33 A. L. R., 176. He is liable only when the injuries resulting in damages were caused by his failure to exercise reasonable care to provide for the safety of his customers or other invitees. These principles apply in the instant case, and in accordance therewith we are of opinion that the evidence offered at the trial in the Forsyth County Court fails to show that defendant was negligent in maintaining the stairway with steps constructed by the owner of the building, on which metal strips were placed so that the surface of the strip on each step was one-sixteenth of an inch higher than the surface of the step between the edge of the metal strip and the back of the step. Plaintiff's fall while descending the stairway, caused by catching the heel of her shoe on the metal strip was not caused by the negligence of defendant. The fall was an accident, for which defendant is not liable. *Pendergrast v. Traction Co.*, 163 N. C., 553, 79 S. E., 984; *Chapman v. Clothier,* 274 Pa., 394, 118 Atl., 356.

The judgment of the Superior Court of Forsyth County is reversed. The action is remanded to said court with direction that judgment be entered in accordance with the decision of this Court.

Reversed.

CLARKSON, J., dissenting: Defendant corporation had a retail mercantile business on the first floor, and in connection with same had also a "Beauty Parlor" on the second floor. The steps going up to the "Beauty Parlor" were of wood. Each step had a tread of nine inches and a rise of eight inches. Across the front of each step was a metal strip two inches wide. The surface of each of these metal strips as they lay upon the step was one-sixteenth of an inch higher than the surface of the step. The purpose of the metal strip was to protect the edge of each step from wear.

Cora Bohannon, a young girl, had gone up the steps to the "Beauty Parlor," and on coming down the steps the steel piece on the edge of the step caught in the heel of her left shoe. She was coming down the steps carefully, as she knew others had fallen on the stairway. She testified, "My heel caught on the steel piece which comes up a fraction above the wood." She sustained injuries and the jury found, under a charge free from error, that defendant was guilty of negligence, that she was not guilty of contributory negligence, and awarded her damages for her injuries.

I think there was sufficient evidence to have been submitted to the jury. In order that the defendant may be liable for negligence, it is not necessary that it could have contemplated, or even been able to anticipate the particular consequence which ensued or the precise injury sustained by plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from its act or omission or that consequences of a generally injurious nature might have been expected. It is said also that it is not required that the particular injury should be foreseen; it is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act. *Hall v. Rinehart,* 192 N. C., 706.

Perhaps the blade of an ordinary knife is less than a sixteenth of an inch, yet it will cut. We have here on this record a piece of steel tacked on wooden steps, leaving a sharp edge, admittedly one-sixteenth of an inch above the floor, like a knife blade. The heel of the young girl's shoe caught on this sharp blade and she was thrown and seriously injured. I think it is a question of due care for the jury to determine under proper instructions, and not for this Court.

I can see no accident in the matter. It was a known cause, and from the known cause defendant could reasonably anticipate that injury might follow. Then, again, from frequent use the steel piece becomes loose and more liable to have the shoe heel caught in it and the person thrown. All this was a matter involving due care for the jury and not a Court to decide. In this cause a learned and experienced judge in the court below thought the evidence sufficient to go to a jury and twelve jurors—selected under the law as men of intelligence and moral character—found the defendant guilty of negligence and the young girl free from blame.

The jury system is a coördinate and right arm of the court, to ascertain facts, and one of the few agencies left to pass on the rights of the average man. Defendant owed plaintiff the duty as an invitee to see that the sharp, knife-like steel was tacked down to the floor in such a manner that the steel piece or blade would not catch a shoe heel and throw a person. The steel tacked down would be firm and would naturally throw a person if the shoe heel caught. At least, all this is a question of due care for the jury and not this Court.

STACY, C. J., concurs in dissent.

T. E. CHEEK AND HIS WIFE, ELIZABETH TAYLOR CHEEK, v. J. M. N. GREGORY ET AL.

(Filed 20 November, 1929.)

1. **Will E a—In absence of residuary clause property not devised descends to heirs at law.**

   In the absence of a general residuary clause in a will, realty owned by the testator at his death and not devised in the will descends to his heirs at law as in case of intestacy.

2. **Will E b—In this case held: "Balance" referred to personalty only and as to certain realty testator died intestate.**

   Where a testator in disposing of his property by will devises certain of his lands to his widow for life and by various other items certain other lands to his mother, brother and sisters, and then by a subsequent item "after the foregoing I want my personal property and all my moneys on hand" equally divided between his wife and son, followed by another item "if there is over ten thousand dollars each for him and his mother besides real estate and property named, the balance I wish to go to my brother and sisters and their children": *Held*, the word "balance" thus used refers only to the personal property, and there being no residuary clause after the life estate devised, the lands thus devised go to the son as the sole heir at law of the testator, as to this property the testator having died intestate.

3. **Appeal and Error J e—Refusal to strike out paragraph of reply which does not affect the cause of action will not be held for error.**

The refusal of the trial court to strike out a certain paragraph of the reply contradictory to one in the complaint will not be held for reversible error on appeal when the allegations thereof do not affect the result of the trial in the lower court.

BROGDEN, J., did not sit.

APPEAL by defendants from *Devin, J.,* at September Term, 1929, of DURHAM. Affirmed.

Action for specific performance of a contract for the purchase of land described therein, and for judgment that the defendants, who claim an interest in said land, have no right, title or estate in or to the same.

There was a judgment by default, for want of an answer, against certain of the defendants named therein, adjudging that said defendants have no right, title, or estate in or to said land, and that as against said defendants, plaintiffs are the owners and are seized in fee of said land. There was no exception to this judgment.

As to the other defendants, the action was heard upon the pleadings and admissions made in open court. Judgment was rendered that the answering defendants, who claim as heirs at law of the brother and sisters of J. W. Cheek, and their children, have no right, title or estate in or to the land described in the contract, and that plaintiffs are the owners and are seized in fee simple of said land; and that plaintiffs are entitled to the specific performance of the contract for the purchase of said land by the other answering defendants.

In accordance with said judgment, there was a decree that the defendants, the Georgia Industrial Realty Company, as assignee of J. M. N. Gregory, and the Southern Railway Company, as beneficiary under said contract, specifically perform the same, by paying to the plaintiffs the sum of $90,000, upon the delivery to said defendants by the plaintiffs of their deed attached to the complaint as Exhibit B, conveying to said defendants the land described in the contract.

From said judgment and decree defendants appealed to the Supreme Court.

Manning & Manning for plaintiffs.
F. C. Owen, W. S. Lockhart and McLendon & Hedrick for defendants.

CONNOR, J. At the hearing of this action in the Superior Court, it was agreed by counsel for both plaintiffs and defendants, that the controversy presented for decision by this action involves only the construction of a provision of the last will and testament of J. W. Cheek, deceased. It is conceded that plaintiffs are entitled to a decree for the specific performance of the contract alleged in the complaint, if the plaintiff, T. E. Cheek, is the owner, and is seized in fee of that part of the land described in the contract, which was owned by J. W. Cheek, at his death, and also that he is such owner and is so seized, if the defendants, other than the purchaser under the contract, have no right, title or estate in or to the land described therein. These defendants contend that as heirs at law of the brother and sisters of J. W. Cheek, deceased, and their children, by virtue of a provision in his last will and testament, they are the owners in fee, and entitled to the possession of said land as tenants in common.

J. W. Cheek died in September, 1875. He left surviving him his wife, Rebecca N. Cheek, and his only son and heir at law, the plaintiff, Thomas Edgar Cheek, who was then nine years of age. His mother, one brother and four sisters also survived him. One of these sisters, Amanda Cheek, was unmarried. His sister, Mrs. Nancy Malone, was dead, having left surviving her three children, William A. Malone, Charles Malone, and Callie Watts. These children of his deceased sister were living at the death of the said J. W. Cheek.

At his death the said J. W. Cheek owned considerable property, both real and personal. He was a resident of Orange County, North Carolina, and had been engaged in the mercantile business. He owned that portion of the land described in the contract, the title to which is involved in this action. This land was situate in that part of Orange County which is now included in Durham County.

A short time before his death, to wit, on 12 April, 1875, the said J. W. Cheek executed his last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Orange County, on 20 September, 1875. This last will and testament, a certified copy of which is attached to the complaint in this action as Exhibit D, is as follows:

"Knowing the uncertainty of life and the certainty of death, I make and publish this my last will and testament.

1st. I give to my wife, Rebecca N. Cheek to have during her natural life the following property, to wit: the house and lot where I now live extending to the plank fence next to where my mother and Sister Amanda live; the house and lot where Col. Dalby lives, with two acres land to go with it, and my half interest in the E. J. Parrish lot and one I bought joining it, also the Frank Barbee land and the land where Ben Carroll lives.

2nd. I give to my son Thomas Edgar Cheek my store houses and lot, except that his mother shall have the rents derived from the old store house during the time she is my widow. I also give to Thomas Edgar the house and lot where P. T. Conrad lives and the James Tillett place, and the land I bought of L. Morris. I also give him my interest in Tobacco Factory lot and Cotton Gin lot, also a vacant lot bought of W. J. Green on Main Street.

3rd. I give to my mother and sister Amanda the use of the house and lot in which they live during their lives, unless Amanda gets married, and then it goes to Edgar.

4th. I give to brother Newton and to each one of my sisters One Thousand Dollars each, and to Wm. A. Malone, Charles Malone and Callie Watts, five hundred dollars each, in cash.

5th. If there is a new Brick Church built by members of Rose of Sharon Church during next three years, I give five hundred dollars to aid in building it.

6th. If my store is in operating at my death and J. L. Markham still with me, I wish him to have at least six months to sell goods and wind up, and if found necessary extend time to twelve months.

7th. I give Thomas Edgar a good bed & furniture, the best bureau and my double case gold watch.

8th. After the foregoing I want my personal property and all moneys on hand divided equally between Thomas Edgar and his mother, except that she shall have all the house hold & kitchen furniture, except what I named for him, and he to have one thousand dollars in Raleigh National Bank.

9th. If there is over ten thousand dollars each for him and his mother including what they may get on my life policy in cash, besides real estate and property named, the balance I wish to go to my brother and sisters and their children.

10th. I wish J. M. Cheek to be allowed to redeem land of his I bought, and if there is a street run from about J. A. McMannen's stables across along back of Hughes & Co. Factory lot, then I desire a line to extend from lower or N. West corner of Simeon Barbee's line straight toward the back line of said land and to extend in other direction to Hughes & Co. line and McMannen, then to have South of said street, I named if run and West of the line joining with West line of Sim Barbee, and I give him any debt he may owe me and the balance of the land named may be divided between Edgar and his mother.

11th. I appoint my wife, Rebecca H. Cheek and Fred C. Geer, my executors to carry out this my last will and testament.

In witness I set my hand & Seal this 12th day of April 1875.

(s) J. W. CHEEK (Seal).

May 20th 1875.

Witness:
J. L. MARKHAM.

. . . . . .

Codicil—I do not wish J. A. McMannen to have the portion of land I name for him upon any condition but that a street is run where I name. Signed 12th April 1875.

(s) J. W. CHEEK (Seal)

May 20th 1875
Witness:
J. L. MARKHAM."

After the death of the said J. W. Cheek his widow, Rebecca N. Cheek, intermarried with A. D. Markham, and thereafter died in 1918; his mother died on 22 September, 1875, and his sister, Amanda Cheek, remained unmarried until her death in 1928. Since the death of his mother, the plaintiff, T. E. Cheek, has been, and is now in the possession of the lands devised to his mother, for her life, by Item 1 of the last will and testament of the said J. W. Cheek. Since the death of his aunt, Amanda Cheek, the plaintiff has been in possession of the land devised to her and the mother of J. W. Cheek, for their lives, by Item No. 3 of said last will and testament. The plaintiff claims the said lands as the sole heir at law of his father, J. W. Cheek, contending that as to the reversionary interest in these lands, the said J. W. Cheek died intestate. The defendants claim the said lands, as heirs at law of the brother and sisters of J. W. Cheek, and their children, contending that said lands, upon the death of the widow and sister of J. W. Cheek, went to the brother and sisters of J. W. Cheek, and their children, under the provisions of Item 9 of his last will and testament.

With respect to these conflicting contentions, Judge Devin was of opinion that "construing the entire will, and particularly paragraphs 8 and 9, it is apparent that the testator did not intend the word 'balance' as used in Item 9 of said will to refer to or pass anything but the balance of his personal property, and that Item 9, although separately numbered, was intended by the testator as and was in effect a proviso or limitation upon the disposition of all his personal property disposed of by Item 8, and that said word 'balance' so used in Item 9 was not intended by the testator to and did not pass any of the real estate or interest in real estate to the brother and sisters of said testator and their children."

In this opinion we concur. There is no error in the judgment "that the defendants, heirs at law of the brother and sisters of J. W. Cheek and their children, have no right, title or interest in the land covered by the deed of plaintiffs tendered to the defendants, the Georgia Industrial Realty Company, for the benefit of the Southern Railway Company." It follows from this decision that the judgment and decree in accordance therewith should be affirmed.

The exception to the refusal of the court to strike out paragraph one of the reply cannot be sustained. In both their complaint and in their reply to the answer of the defendants, plaintiffs allege that J. W. Cheek died intestate as to the reversion in the lands devised in Item 1 of his will to his wife for her life, and in Item 3 of said will to his mother and sister, Amanda Cheek, for their lives. The allegation in the complaint that neither the widow of the testator nor the plaintiff, T. E. Cheek, received the sum of $10,000 from his personal estate was not material to their recovery. The admission in their reply that said sums were received by the said widow and by the plaintiff, does not affect the cause of action upon which plaintiffs rely for their recovery in this action. This cause of action is based upon the allegation that the reversionary interest in the lands devised to his wife, for her life, by Item 1, and to his mother and unmarried sister, for their lives, by Item 3, of the last will and testament of J. W. Cheek, were not devised by the testator, and therefore, descended to the plaintiff, T. E. Cheek, as his sole heir at law. It is well settled, of course, that in the absence of a general residuary clause in a will, land owned by the testator at his death, and not devised by his will, descends to his heirs at law, as in case of intestacy. *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769.

There is nothing in the language used by the testator in Item 9 of this will, which requires or justifies a construction of said item by which it must be held that the testator intended to deprive his only son—an infant, nine years of age—of the lands devised to his wife for her life, or to his mother and sister, for their lives, at their death, and to give said lands to his brother and sisters and their children. We find no error in the judgment or in the decree.

Affirmed.

BROGDEN, J., not sitting.

HOLMES ELECTRIC COMPANY, INC., v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 20 November, 1929.)

1. **Jury C b—Right to trial by jury in mandamus proceedings is waived by failure to make motion therefor in apt time.**

The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Article IV, sec. 13, but the manner of such waiver is governed by statute, C. S., 568, and where the plaintiff in mandamus proceedings to compel a power company to furnish it electricity for redistribution to its customers at retail fails to move in apt time for the preservation of its right to trial by jury, C. S., 868, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion is not made in apt time, and the right to trial by jury is waived.

2. **Electricity B a—In this case mandamus to compel power company to sell current to plaintiff for resale at retail was properly denied.**

Where an electric power company has not held itself out or furnished other distributing lines electricity for redistribution or resale to the latter's customers, it may not be compelled to do so by mandamus, as it has the right to restrict its services to the consumers of electricity alone when not discriminatory against distributors. *Southern Power cases,* 179 N. C., 18, 330; 180 N. C., 335, cited and distinguished.

CIVIL ACTION, before *Cranmer, J.,* 27 March, 1929, at Chambers, CUMBERLAND County.

The plaintiff alleged that it is a public-service corporation and had constructed and maintained a system of poles and wires and other necessary things to transmit, deliver and sell electric current to persons, firms and corporations living or having places of business outside of the corporate limits of the city of Fayetteville in Cumberland County, and running in every direction therefrom a distance of approximately nine miles, except the territory embraced within the corporate limits of the town of Hope Mills. On 7 February, 1929, the plaintiff made application to defendant to be allowed "to purchase from said defendant primary electric current in the approximate amount of 20,000 K. W. H. per month, such electric current to be supplied by the defendant and taken by the plaintiff at or near a substation built and maintained for the delivery of current by the defendant, near the Victory Mills, near said city of Fayetteville," etc. Plaintiff was desirous of purchasing current for the purpose of resale or redistribution to other parties within the area described.

The defendant refused to furnish electric current for redistribution upon the ground that such resale of current would constitute the plaintiff a competitor of the defendant or of the city of Fayetteville with which the defendant had a contract for the sale of electric current for use and redistribution by said city, and further, that to furnish current to the plaintiff under the circumstances would constitute a breach of the contract existing between the defendant and the city of Fayetteville.

There was evidence to the effect that the plaintiff did not for the years 1927 and 1928, nor for any other years file with the Corporation Commission an annual report required to be filed by all public utilities operating in the State of North Carolina, nor has the plaintiff filed with or secured the approval of the Commission of rates to be charged by it. There was further evidence that the plaintiff had not filed with the Department of Revenue reports required by the Revenue Act of

1927. It further appeared that the plaintiff corporation had listed no taxes for property in Cumberland County.

The judgment was as follows:

"This cause coming on to be heard at Fayetteville, N. C., on 27 March, 1929, having been continued by consent until this day, and being heard upon the pleadings, affidavits and exhibits filed, the court finds the following facts:

1. Plaintiff, Holmes Electric Company, Inc., is a corporation doing business in the city of Fayetteville, N. C., under the powers granted in its charter, as appears of record, and the defendant, Carolina Power and Light Company, is a public-service corporation, doing business as such, and it owns, operates and maintains plants, transmission lines and other equipment for the generation and distribution of electric power.

2. That the plaintiff owns certain disconnected lines of poles and wires near the city of Fayetteville, N. C., over which the city of Fayetteville transmits and delivers electric current to various consumers outside of the corporate limits of the city of Fayetteville, and the city of Fayetteville, through its Public Works Commission, collects and receives the revenue from such consumers, and the plaintiff company is not now and never has been, a distributory of electric current, or electric power, and has only maintained the lines over which the current is delivered and charged various tap fees therefor. That plaintiff company has demanded from the defendant that the defendant deliver to the plaintiff electric current to be used solely for redistribution, and as such the plaintiff is not a consumer of electric current, but expects to deliver such current to consumers at a profit.

3. That the Carolina Power and Light Company has never entered the field of delivering current for redistribution to persons, firms or corporations who expected to use the same solely for redistribution at retail, but it has only sold its current to municipal corporations for redistribution among the citizens of the municipality and community and to large manufacturing corporations who purchased electric current in large quantities for industrial purposes and for redistribution to its employees.

4. That if the plaintiff were furnished electric current by the defendant, same would be used by the plaintiff in competition with the defendant and the city of Fayetteville, with whom the defendant has a contract, as set out in the pleadings.

Under the foregoing facts, the court being of opinion that the application should be denied;

It is thereupon considered, ordered and adjudged by the court that the application for writ of mandamus be, and the same is hereby denied, plaintiff to pay the costs of this action."

From the foregoing judgment the plaintiff appealed.

Brooks, Parker, Smith & Wharton and C. Murchison Walker for plaintiff.

W. H. Weatherspoon, Pou & Pou and Rose & Lyon for defendant.

BROGDEN, J. 1. Can a plaintiff institute a mandamus proceeding returnable before a Superior Court judge, appear at the hearing, and after a full hearing and argument by counsel representing plaintiff and defendant, and after judgment has been tendered by the defendant, thereupon demand a jury trial upon issues of fact raised by the pleadings?

2. Was the judgment denying the mandamus correct?

The right of trial by a jury is guaranteed by the Constitution. Article IV, section 13, of the Constitution of North Carolina provides: "In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury." The Constitution, of course, does not prescribe the method by which a jury trial may be waived. Such provision is made by statute. C. S., 568, provides three methods of waiver.

A mandamus proceeding, however, is governed by C. S., 868, when the relief sought is other than a money demand. This statute provides in substance that the summons must be made returnable before a judge of the Superior Court at Chambers and upon the return date, "the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court." The plain meaning of the statute is that the judge has the power to hear and determine the law and the facts; but, if an issue of fact is raised in the pleadings, and either party moves for a jury trial, the power of the judge to proceed further is at an end and he must continue the action until such issue of fact can be decided by a jury at the next regular term of court. It is, therefore, apparent that the right of jury trial is dependent "upon the motion of either party" (*Lenoir County v. Taylor,* 190 N. C., 366, 130 S. E., 25); and unless a party shall move for a jury trial in such cases, the issue may be determined by the court. *Cannon v. Mills Co.,* 195 N. C., 119, 141 S. E., 344.

It is thoroughly settled that where rights are dependent upon a motion, such motion must be made in apt time. Was the motion in the case at bar made in apt time as contemplated by law?

The record discloses that "after the argument and when the judgment was tendered by the defendant, counsel for the plaintiff made the following motion: "Plaintiff moves the court for a jury trial on the issues of fact raised by the pleadings for that it is a seriously controverted fact whether or not the defendant has been selling electric current to persons, firms and corporations for resale or redistribution, and for that it also is a seriously controverted fact as to whether or not the plaintiff and the defendant are competitors." The record further discloses that this motion was made "after full hearing and argument by counsel representing plaintiff and the defendant and when the judgment was tendered by the defendant." In *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16, this Court declared: "The defendant had attacked the report by exceptions, alleging radical error in it, and if plaintiff was not willing, as his conduct did not indicate, that the judge should hear and decide upon these exceptions with a jury, he could have enforced his constitutional right by framing such issues on defendant's exceptions as he thought were proper, and have them passed upon, not by the court, but by a jury, so that he might exercise his constitutional right and have the full benefit thereof by having a jury say whether there was any error of the referee, as specified in the defendant's exceptions. But this he did not do, but, by his silence, if not by his affirmative action and conduct, he manifestly evinced his purpose to make what he considered a wise and safe election, and have the judge decide upon the exceptions of defendants. If we should permit him now, after deliberately making this choice, and lost, to take another chance, it would not be fair to the defendants, who had trusted the matter to the judge, and who supposed, and had the right to suppose, that the plaintiff had likewise done so. The law rarely gives a litigant more than one fair chance." *Lumber Co. v. Pemberton,* 188 N. C., 532, 125 S. E., 19; *Jenkins v. Parker,* 192 N. C., 188, 134 S. E., 419.

The words "apt time" have been defined by this Court to refer "to the *order* of proceeding, as *fit* or *suitable* time." . . . When anything is done in proper *order,* then whether the time is long or short, makes no difference. *Pugh v. York,* 74 N. C., 383. For instance, an objection to remarks made by a judge during the trial must be made in apt time. An objection made after verdict is not in apt time. *S. v. Brown,* 100 N. C., 519, 6 S. E., 568; *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838. It has also been held that "a party to an action cannot be heard to demand a jury trial after the facts are found against him when he has offered evidence and submitted to a trial by the court without objection." *Drewry v. Bank,* 173 N. C., 664, 92 S. E., 593.

In the case at bar, obviously, the motion for a trial by jury was not made until the judge had intimated his opinion and judgment in accordance therewith had been tendered by the defendant. Therefore, by analogy the motion came after verdict and under all the decisions was not made in apt time.

The second question of law involves the correctness of the judgment rendered. The plaintiff relies upon the *Southern Power Company cases,* reported in 179 N. C., 18, 101 S. E., 593; 179 N. C., 330, 102 S. E., 625; 180 N. C., 335, 104 S. E., 872, 282 Fed., 837. The *Power cases* reported in 179 N. C., 18, and 179 N. C., 330, develop and declare the principles of law pertinent to a decision of the present case. It should be observed at the outset that these cases were decided by a sharply divided Court. The true theory of the decision is contained in the opinion of *Justice Brown* upon the petition to rehear, reported in 179 N. C., 330. The opinion declares: "In my opinion the defendant had the right originally to confine its sales and contracts to those desiring electricity for direct personal consumption, and thereby retain control of the number of its consumers, limiting them to that number it could adequately serve. But when defendant voluntarily entered the field of supplying current to a person or corporation which does not desire it for consumption, but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provisions of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation desiring current from it for distribution purposes prima facie has precisely the same right to obtain it as another. A public-service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reason.

If the defendant in the beginning had elected to supply only the individual consumer, I am satisfied it could not have been compelled to supply smaller corporations engaged in retailing the electric current. But when defendant commenced and continued to sell its current to such smaller corporations for purposes of resale and distribution, every such corporation has an equal right, and it must not discriminate."

Thus it is manifest that the decisions of the Court in the *Power cases* rested upon the fact that the defendant had entered the field of selling and supplying current for resale and redistribution. Having so entered the field, it could not thereafter make arbitrary discriminations.

The record in the case at bar discloses that the trial judge found as a fact that "the plaintiff company is not now and never has been a distributory of electric current, or electric power, and has only maintained lines over which the current is delivered and charged various tap fees therefor." The court further found "that the Carolina Power and Light Company has never entered the field of delivering current for redistribution to persons, firms or corporations who expected to use the same solely for redistribution at retail," etc.

These findings of fact take this case out of the boundary of the *Power Company cases* upon which the plaintiff relies, and the judgment rendered by the court upon the facts appearing in this particular record correctly applies the law as formerly declared by this Court.

Affirmed.

LEONARD LILES, BY HIS NEXT FRIEND, v. HANNAH PICKETT MILLS, INC.

(Filed 20 November, 1929.)

Evidence K c—Competency of witness as expert is addressed to discretion of trial court and his finding is ordinarily conclusive.

Whether a witness is competent to testify as an expert is a question primarily addressed to the sound discretion of the trial court, and his decision is ordinarily conclusive, and where an X-ray photograph of an injury bearing upon an issue involved in the action depends upon the explanation of an expert to make it understandable to the jury, the finding of the trial court that the witness was not qualified as an expert to give the explanation and excluding the photograph offered will not be disturbed on appeal.

APPEAL by plaintiff from *Shaw, J.*, at June Term, 1929, of RICHMOND. No error.

Garrett & Page and W. R. Jones for plaintiff.
Fred W. Bynum for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for an assault alleged to have been inflicted upon him by an overseer of the defendant in a weaving room in which the plaintiff performed his work. The allegations of the complaint were denied and the first issue—"Was the plaintiff wrongfully assaulted by Arch White as alleged in the complaint?"—was answered in the negative. It was admitted that the plaintiff inflicted serious physical injury on the overseer, but the plaintiff contended that he had acted in self-defense. He alleged that during the encounter the overseer struck him with a wrench and fractured his skull. For the purpose of showing the fracture he offered in evidence an X-ray photograph taken by one of his witnesses. The judge expressed his willingness to admit the photograph in evidence provided expert testimony was introduced satisfactorily explaining the photograph to the jury, but held upon the evidence offered that the witness had not qualified himself as sufficiently expert in questions of anatomy to testify in reference to the proposed explanation. On this point he therefore excluded the testimony of the witness. No other expert evidence was offered. We see no error in this ruling. Whether a witness is competent to testify as an expert is a question primarily addressed to the sound discretion of the court, and his decision is ordinarily conclusive. *S. v. Wilcox,* 132 N. C., 1120; *Hammond v. Schiff,* 100 N. C., 161. This is not in conflict with the decision of the Court in *Pridgen v. Gibson,* 194 N. C., 289. There it was held that the preliminary question as to the qualification of a witness is subject to review when it is obviously made to turn upon error in law, and that a witness who is an expert need not necessarily be a technical specialist. In this case it was found as a fact that the witness was not sufficiently qualified to express an expert opinion on questions of anatomy, and upon this finding the testimony was properly excluded.

No error.

AMANDA PAYLOR, ADMINISTRATRIX, v. B. S. WILLIAMS.

(Filed 3 April, 1929.)

APPEAL by defendant from *Devin, J.,* at October Term, 1928, of ORANGE.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant in running him down and striking him with a high-powered automobile.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff.

From the judgment entered on the verdict the defendant appeals, assigning errors.

Brawley & Gantt and Gattis & Gattis for plaintiff.
Fuller, Reade & Fuller, J. A. Giles and R. T. Giles for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that no error was committed on the trial of the cause. The evidence was amply sufficient to carry the case to the jury, and we have discovered no ruling or action of the trial court which we apprehend should be held for reversible error. The verdict and judgment will be upheld.

No error.

CHAPEL HILL SUPPLY COMPANY v. HAGEDORN CONSTRUCTION COMPANY ET AL.

(Filed 3 April, 1929.)

APPEAL by defendants from *Devin, J.*, at August Term, 1928, of ORANGE. No error.

Gattis & Gattis for plaintiff.
King, Sapp & King for Construction Company.

PER CURIAM. On 24 November, 1924, the plaintiff and the Hagedorn Construction Company entered into a contract by the terms of which the plaintiff was to sell and deliver to the defendant a certain quantity of crushed stone, and by a subsequent oral agreement the quantity was changed from ten thousand cubic yards to twelve thousand, and the price was reduced from $3.20 to $3.15 per cubic yard. On 8 June, 1925, the Hagedorn Company gave the plaintiff a trade acceptance in the sum of $4,506.72, payable 15 July, 1925. The plaintiff alleged that on 8 December, 1925, it sold and delivered to the construction company 54.8 cubic yards of crushed stone at the price of $172.62, and 74 cubic yards of screenings at the price of $55.50. Suit was brought to recover the amount of these items.

The defendants denied that the plaintiff had complied with the contract, and alleged that at all times they had been ready to perform their contract, and that final measurements had not been made when the trade acceptance was given; that there was a shortage in the quantity of stone actually delivered; that the plaintiff had agreed to make good the deficiency, and that the construction company was thereby induced to sign the acceptance. They alleged that by reason of the plaintiff's failure to comply with the contract the construction company, in order to carry out its contract with the Highway Commission, had to buy stone in the open market at a cost of $2,237.62 in excess of what the cost would have been if the plaintiff had carried out its agreement, and that the construction company was entitled to recover this sum from the plaintiff, less $588.12, the balance alleged to be due the plaintiff for stone actually delivered, leaving as the amount due the defendant $1,649.50. The defendant demanded judgment against the plaintiff for this sum. In response to the issues the jury found that the defendant was indebted to the plaintiff in the sum of $4,734.84 with interest, and that the plaintiff was not indebted to the defendant. Judgment was rendered for the plaintiff and the defendant appealed.

The defendants say that incompetent evidence was admitted, and that error appears in the charge as to the burden of proof on the first issue. These contentions embrace all the exceptions, neither of which can be sustained. There is

No error.

CLORA HARDIN v. R. L. MYERS, ADMINISTRATOR OF JOHN T. HARDIN, LEONADAS (BUD) HARDIN AND WIFE, MRS. LEONADAS HARDIN, WILL CARMICHAEL AND WIFE, ELIZA HARDIN CARMICHAEL, AND SOUTHERN REALTY COMPANY.

(Filed 10 April, 1929.)

APPEAL by defendants from *Moore, J.*, at February Term, 1929, of FORSYTH. Affirmed.

This is an action brought by plaintiff against the defendants, administrator and heirs at law of John T. Hardin, who is dead, and the Southern Realty Company, to reform certain deeds made by the Southern Realty Company to John T. Hardin, for mutual mistake. Said deeds made "through and by the mutual mistake of the defendant, Southern Realty Company, and the plaintiff and her deceased husband," John T. Hardin. The alleged mistake was that the deed should have been made to John T. Hardin and wife, Clora Hardin, the plaintiff. The action was tried in the Forsyth County Court before Judge Oscar O. Efird, and a jury. All the issues submitted to the jury, and their answers thereto, were found in favor of plaintiff. Defendants made numerous exceptions and assignments of error on the trial in the Forsyth County Court, and from the judgment appealed to the Superior Court. In the Superior Court the exceptions and assignments of error made by defendants in the Forsyth County Court were overruled and defendants assigned errors and appealed to the Supreme Court.

Archie Elledge for plaintiff.
George W. Braddy and W. L. Morris for defendants.

PER CURIAM. We have read with care the record in this action and the briefs of the parties. We think the case was tried in the Forsyth County Court in accordance with well-settled principles of law. The exceptions and assignments of error, as to the admission and exclusion of evidence, the charge and prayer for special instruction are without merit. The judge in the Forsyth County Court was careful in his rulings on the evidence. The charge was clear and gave the law applicable to the facts and the contentions of the parties fairly on both sides. The judge of the Superior Court on appeal overruled all the exceptions and assignments of error. The judge of the Forsyth County Court charged the jury: "The burden of proof, gentlemen of the jury, rests upon the plaintiff to satisfy you by clear, strong, cogent and convincing evidence of the affirmative of these several issues, as the facts shall severally apply to these three issues." This burden was repeated. The facts were for the jury to decide. The facts were found by the jury in favor of plaintiff.

On the entire record we find no error. The judgment of the Superior Court is

Affirmed.

H. P. ALSPAUGH v. COMMISSIONERS OF FORSYTH COUNTY DRAINAGE DISTRICT No. 2.

(Filed 10 April, 1929.)

APPEAL by plaintiff from *Moore, J.*, at February Term, 1929, of FORSYTH. Affirmed.

Hastings & Booe for plaintiff.
Manly, Hendren & Womble for defendants.

PER CURIAM. This was an action to restrain the defendants from levying an assessment and selling bonds for the establishment of a drainage district on the ground set out in the plaintiff's complaint. The defendants filed an answer, and upon the hearing the presiding judge found the facts which are set out in the record. Upon the facts as found, we are of opinion that the judgment is free from error and that it should be affirmed. No principle of law is presented requiring any special discussion. Judgment

Affirmed.

AMERICAN RADIATOR COMPANY v. DIXIE FIRE INSURANCE COMPANY.

(Filed 17 April, 1929.)

APPEAL by plaintiff from *Shaw, J.*, at August Term, 1928, of GUILFORD. No error.

Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

PER CURIAM. The questions involved in this case are the same as those in *Tomlinson Company, Inc., v. Fire Insurance Company, Inc., post,* 777, and the principles applicable here are the same as those controlling in that case. The amount found for the plaintiff was admitted by the defendant to be due.

No error.

TOMLINSON COMPANY, INC., v. DIXIE FIRE INSURANCE COMPANY, INC.

(Filed 17 April, 1929.)

APPEAL by plaintiff from *Shaw, J.,* at August Term, 1928, of GUILFORD. No error.

Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

PER CURIAM. Two questions are involved in the appeal: (1) Is the evidence sufficient in law to warrant the submission to the jury of the question whether B. MacKenzie was an independent contractor? (2) Was there error in refusing the prayer directing a verdict for the plaintiff?

Three issues were submitted to the jury, and in response to the first it was found as a fact that MacKenzie was an independent contractor. The second and third issues relating to the alleged indebtedness of the defendant to the plaintiff and to the plaintiff's right to a lien on the premises were answered in the negative. Judgment was given for the defendant, and plaintiff excepted and appealed.

Upon an examination of the record we are satisfied that there was sufficient evidence to support the verdict upon the first issue, and are of opinion that no error was committed in refusing plaintiff's prayer for special instructions directing the verdict for the plaintiff.

The principles arising upon the exception have been so frequently before the Court as to make it unnecessary specifically to review the entire evidence in its application to the controlling principles of law. We find

No error.

STATE v. BURLEY CAGLE.

(Filed 24 April, 1929.)

CRIMINAL ACTION, before *Shaw, J.*, at January Term, 1929, of MOORE.

The defendant was indicted for killing Coley Smith. The solicitor did not ask for a conviction of murder in the first degree. There was a verdict of guilty of murder in the second degree, and the defendant was sentenced to serve not less than ten and not more than sixteen years in the State's prison.

From judgment pronounced the plaintiff appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. R. Clegg for defendant.

PER CURIAM. The evidence offered in behalf of the State tended to show that the defendant killed the deceased intentionally. Upon the other hand the evidence for the defendant tended to show that the killing was accidental. Both phases of the case were fairly submitted to the jury and the pertinent principles of law properly applied. It appears to us that the defendant has had a fair trial, and there is no error of law appearing in the record. Hence the judgment must stand.

No error.

SOUTHERN RAILWAY COMPANY v. SAM SCHWARTZ.

(Filed 1 May, 1929.)

APPEAL by plaintiff from *Harwood, Special Judge,* and a jury, at October Term, 1928, of MECKLENBURG. No error.

The facts of the controversy are fully set forth in the judgment of the court below, which is as follows:

"This cause coming on to be heard . . . and being heard, and the jury having answered the issues presented to it as follows:

(1) In what freight classification, under the tariffs of the Interstate Commerce Commission, was the shipment referred to in the complaint? Answer: Scrap iron. 7. Did the plaintiff wrongfully refuse to deliver said shipment? Answer: Yes. 8. If so, what damages is the defendant entitled to recover of the plaintiff on account thereof? Answer: $429.48, less freight. It is recommended by the jury that the defendant be allowed interest on the net amount recovered at the rate of six per cent

per annum. And by agreement of all parties the court answered the other issues; after the coming in of the verdict of the jury the court answering as follows:

(2) In what amount is the defendant indebted to the plaintiff for the transportation of said shipment from Charleston, S. C., to Norfolk, Va.? Answer: $121.91.

(3) In what amount, if any, is the defendant indebted to the plaintiff for demurrage on said shipment? Answer: Nothing.

And it having been agreed by the plaintiff and the defendant that the freight on scrap iron from Charleston, S. C., to Norfolk, Va., is $121.91:

It is, therefore, ordered, adjudged and decreed that the plaintiff recover nothing of the defendant; and that the defendant recover of the plaintiff the sum of $307.57, and interest on said amount from 12 July, 1924."

John M. Robinson and Hunter M. Jones for plaintiff.
Stewart, MacRae & Bobbitt for defendant.

Per Curiam. From hearing the argument of counsel in this action and carefully reading the record and briefs, we can find no reversible or prejudicial error. The controversy narrowed itself down mainly to questions of fact, which were found by the jury in favor of the defendant.

There is no new or novel proposition of law appearing in the record. In the judgment below there is

No error.

R. D. McREE v. GEORGE H. TALBOT.

(Filed 1 May, 1929.)

Appeal by defendant from *Sink, Special Judge,* at February Special Term, 1929, of Mecklenburg.

Civil action to recover for material furnished and work done by plaintiff in repairing defendant's house, and to impress lien thereon.

Upon denial of liability and issues joined, the jury returned a verdict in favor of plaintiff, entitling him to enforce his lien.

Defendant appeals, assigning errors.

Stewart, MacRae & Bobbitt for plaintiff.
Bordeaux & Shelton and G. A. Smith for defendant.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, determinable alone by the jury. A careful perusal of the record leaves us with the impression that the case has been heard and concluded substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error. The exceptions relative to the admission and exclusion of evidence must all be resolved in favor of the validity of the trial; the case presents no new questions of law, or one not heretofore settled by our decisions. The verdict and judgment will be upheld.

No error.

SALLIE D. WILDER v. ODOM ALEXANDER.

(Filed 8 May, 1929.)

APPEAL by defendant from *Harding, J.*, at October Term, 1928, of MECKLENBURG. No error.

The plaintiff alleged that she was the owner of a building in the city of Charlotte known as the Wilder Building; that K. M. Blake was directed to act for her in leasing it; that M. B. Rose was the rental agent, and that on 7 May, 1926, K. M. Blake and the defendant signed the following paper:

"Mr. M. B. Rose, Agent for K. M. Blake.

Dear Sir:

I propose to rent from you the storeroom No. 5 of the New Wilder Building, said store fronting on East Third Street, at a rental of $157.50 per month for a period of five years from 1 June, 1926. The regular lease of the building to be signed when prepared and presented.

ODOM ALEXANDER. (Seal)
K. M. BLAKE. (Seal)
Accepted."

It was further alleged that storeroom No. 5 was available for occupancy by the defendant from and after July, 1926, and that in September, 1926, the defendant notified the rental agent that he would not occupy the room, in consequence of which it remained vacant for fifteen and one-half months after 1 July, 1926; that the plaintiff was ready, able and willing to carry out her contract; that the defendant had failed to comply; and that the plaintiff was entitled to damages.

The defendant filed an answer, and upon issues joined the jury returned the following verdict:

1. Did the defendant and the plaintiff enter into the contract marked "Exhibit A," as alleged in the complaint? Answer: Yes.

2. Did the defendant breach said contract? Answer: Yes.

3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $1,501.25, with interest.

Judgment for the plaintiff and appeal by defendant upon assigned error.

Thaddeus A. Adams for appellant.
Stewart, MacRae & Bobbitt for appellee.

PER CURIAM. The defendant relies principally on the fourth and eleventh exceptions, which are addressed to the judge's refusal to dismiss the action as in case of nonsuit. We have scrutinized these exceptions and the remaining eleven, and find no error in any of them which entitles the defendant to a new trial.

No error.

BERRY JACKSON v. J. A. JONES CONSTRUCTION COMPANY.

(Filed 8 May, 1929.)

APPEAL by defendant from *Sink, Special Judge,* at February Special Term, 1929, of MECKLENBURG.

Civil action by plaintiff, employee of the defendant, to recover damages for personal injury, alleged to have been caused by the negligence of the defendant's foreman, in directing and requiring plaintiff, while engaged in construction work in the city of Charlotte, to carry a crooked piece of steel, 10 or 15 feet long, weighing three or four hundred pounds, across a ditch four feet wide and about four feet deep, without any assistance, which caused plaintiff to fall, as he jumped the ditch, and resulted in serious injury to one of his legs.

Upon denial of liability and issues joined, there was a verdict and judgment for the plaintiff, from which the defendant appeals, assigning errors.

G. T. Carswell and Joe W. Ervin for plaintiff.
J. Laurence Jones for defendant.

PER CURIAM. The case presents no new question of law. It is not different in principle from *Cherry v. R. R.*, 174 N. C., 263, 93 S. E., 783, or *Pigford v. R. R.*, 160 N. C., 93, 75 S. E., 860. On authority of these cases the judgment will be upheld.

No error.

DODSON & COMPANY v. GROVES COTTON COMPANY.

(Filed 8 May, 1929.)

APPEAL by defendant from *Stack, J.*, at January Term, 1929, of GASTON.

Civil action for breach of contract, tried upon the following issues:

"1. Did the defendant, L. C. Groves, doing business as Groves Cotton Company, contract with the plaintiffs, Dodson & Company, for a shipment and delivery of 100 bales of cotton, middling white, equal type, 'Best' to be shipped to Gastonia, N. C., on or before 15 December, 1927, at the price of 28½ cents per pound, as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff comply with the order and ship the cotton as directed? Answer: Yes.

3. If so, did the defendant breach his contract as alleged? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,176.64."

Judgment on the verdict for plaintiffs, from which the defendant appeals, assigning errors.

P. W. Garland for plaintiffs.
Mangum & Denny for defendant.

PER CURIAM. The appellant presents a large number of exceptions and assignments of errors, but a careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable, and that the verdict and judgment should be upheld. No action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The case narrowed itself largely to one of controverted facts, determinable only by a jury verdict, which has been rendered in favor of the plaintiffs.

No error.

SAM L. SMITH v. PILOT INSURANCE AND REALTY COMPANY, INC., ET AL.

(Filed 8 May, 1929.)

APPEAL by plaintiff from *Sinclair, J.*, at April Term, 1928, of MONTGOMERY. No error.

Action to recover damages for breach of contract to procure deed from owners of land conveying the same to plaintiff.

From judgment on an adverse verdict plaintiff appealed to the Supreme Court.

W. A. Cochran for plaintiff
No counsel for defendants.

PER CURIAM. The only exceptions set out and discussed in the brief filed for plaintiff in this Court are to instructions of the court in the charge to the jury. Other exceptions appearing in the case on appeal are abandoned. Rule 28.

The contract is in writing; its execution is admitted, and it is free from ambiguity. It was correctly construed by the court, as a contract to procure from the owners within thirty days a deed conveying the land to plaintiff, or upon failure to do so, to return to plaintiff the money paid to defendants on the purchase price. There was evidence tending to show that defendants had not breached the contract, and are therefore not liable to plaintiff for damages. The evidence was submitted by the court under instructions which are free from error. The judgment in accordance with the verdict is affirmed.

No error.

J. M. TALLANT AND MRS. MAUD TALLANT v. B. & H. COACH COMPANY.

(Filed 8 May, 1929.)

APPEAL by defendant from *Harding, J.*, at November Term, 1928, of MECKLENBURG. No error.

Actions begun by the above-named plaintiffs to recover damages for injuries caused by the negligence of the defendant were consolidated, by consent, for trial, and were tried together.

From judgment on the verdict, defendant appealed to the Supreme Court.

Stancil & Davis and D. E. Henderson for plaintiffs.
John W. Hester for defendant.

PER CURIAM. All the evidence offered at the trial tended to show that the automobile in which plaintiffs were riding from their home to their store, in the city of Charlotte, was forced from the highway into a ditch by the negligence of the driver of a bus. The controversy between the plaintiffs and the defendant arose chiefly from their conflicting contentions as to whether or not the bus was owned by the defendant and operated by its driver. There was evidence tending to sustain the contention of each party with respect to this matter. The conflicting evidence was submitted to the jury under a charge to which there were no exceptions. There was no error in excluding testimony offered as evidence that an attorney for plaintiffs, prior to the commencement of the actions, made inquiries for the purpose of ascertaining whether the bus whose driver forced the plaintiffs from the highway into the ditch was owned by defendants. Conceding that this testimony would have had some slight probative value had the inquiries been made by the plaintiffs, or either of them, it was not competent for that it does not appear that plaintiffs had authorized any one to make inquiries with respect to the matter. It does not appear that the person making the inquiries was at the time the attorney for either of the plaintiffs. The judgment is affirmed.

No error.

C. C. CRANFORD ET AL. v. W. W. BRYANT ET AL.

(Filed 8 May, 1929.)

APPEAL by defendants from *Oglesby, J.*, at July Term, 1928, of RANDOLPH. No error.

J. A. Spence and H. M. Robins for plaintiffs.
Brittain & Brittain, Gold & York, and Charles W. McAnally for defendants.

PER CURIAM. This is a civil action in which personal property was seized by the sheriff under proceedings in claim and delivery and replevied by the defendants. The only issue was as to the amount the plaintiffs were entitled to recover for the deterioration and detention of the property. We have examined the exceptions and find no error entitling the appellants to a new trial.

No error.

GEORGIA MULL, BY HER NEXT FRIEND, LORETTA MULL, v. J. M. MOCK ET AL., TRADING AS ALLEN-SILER COMPANY.

(Filed 29 May, 1929.)

APPEAL by defendants from *Harwood, Special Judge,* at the March-April Special Term, 1929, of HAYWOOD. No error.

John M. Queen and Alley & Alley for plaintiff.
Morgan, Ward & Stamey for defendants.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the negligence of the defendants. There was evidence tending to show that on 30 June, 1928, the plaintiff, a girl 13 years of age, was returning to her home on highway No. 10, and that she was struck by a truck belonging to the defendants and operated by one of their employees. The defense was that the plaintiff's injury was caused solely by the negligence of a man named Morgan who was driving his automobile on the highway. The controversy was reduced practically to issues of fact, which were submitted to the jury and answered in favor of the plaintiff. We have examined the exceptions of the appellants and have been unable to find any substantial ground for a new trial.

No error.

FRANCES P. BOSTWICK v. L. B. JACKSON.

(Filed 12 June, 1929.)

APPEAL by defendant from *Sink, Special Judge,* at May Special Term, 1928, of BUNCOMBE. No error.

Action to recover for services rendered by plaintiff to defendant under a contract of employment. The controversy involves only the amount which plaintiff is entitled to recover of defendant, who admits that he is indebted to plaintiff for services in the sum of $1,200. Plaintiff contends that defendant is indebted to her in the sum of $1,800.

From judgment on an adverse verdict defendant appealed to the Supreme Court.

Roberts, Young & Lane for plaintiff.
Thomas S. Rollins for defendant.

PER CURIAM. Defendant's assignments of error on his appeal to this Court are based on exceptions to instructions in the charge of the court to the jury, and to the failure of the court to comply in the charge with the provisions of C. S., 564. They cannot be sustained. The judgment is affirmed.

No error.

J. R. JENKINS, ADMINISTRATOR OF LEVI JENKINS, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 12 June, 1929.)

APPEAL by defendant, Southern Railway Company, from *Harwood, Special Judge,* at April Special Term, 1929, of HAYWOOD. No error.

Action to recover damages for the wrongful death of plaintiff's intestate.

There was a judgment of nonsuit as to defendants other than Southern Railway Company.

From judgment on the verdict that plaintiff recover of the defendant, Southern Railway Company, the sum of $4,500 as damages, the said defendant appealed to the Supreme Court.

W. R. Francis and Alley & Alley for plaintiff.
Thomas S. Rollins for defendant.

PER CURIAM. From a judgment dismissing this action as of nonsuit, rendered at a trial in the Superior Court of Haywood County, October Special Term, 1928, plaintiff appealed to this Court. The judgment was reversed. 196 N. C., 466. We were of opinion, and so held, that the evidence offered at said trial should have been submitted to the jury, under appropriate instructions upon issues involving (1) actionable negligence on the part of the defendants; (2) contributory negligence on the part of deceased; (3) the principle of the "last clear chance"; and (4) damages.

At the trial resulting in the judgment from which defendant, Southern Railway Company, has appealed, the evidence was substantially the same as that on the former trial. Defendant on this appeal relies chiefly on its assignment of error based upon its exception to the refusal of the court to allow its motion for judgment as of nonsuit at the close of the evidence. This assignment of error cannot be sustained. The motion was properly denied upon the authority of our decision in the former appeal. We find no error, and the judgment is affirmed.

No error.

STACY, C. J., dissents.

IN RE WILL OF WILLIAM HARRIS.

(Filed 11 September, 1929.)

APPEAL by caveators from *Devin, J.,* and a jury, at February Term, 1929, of PASQUOTANK. No error.

The issues submitted to the jury and their answers thereto were as follows:

"1. Were the paper-writings propounded as the last will and testament of William Harris, and the codicil thereto, executed in the manner and form as prescribed by the statute of the execution of a last will and testament? Answer: Yes.

2. At the time of the execution of said paper-writings was the said William Harris without sufficient mental capacity to make a will? Answer: No.

3. Was the execution of said paper-writings propounded as the will of William Harris procured by the undue influence of Mrs. Maggie Harris? Answer: No."

Thompson & Wilson, McMullan & LeRoy for caveators.
Aydlett & Simpson and Ehringhaus & Hall for propounders.

PER CURIAM. We have read the record and briefs with care. We do not think the exceptions and assignments of error made by caveators can be sustained. We can see no reason why the testimony objected to by caveators was incompetent. If the testimony had been incompetent, we think it harmless and not prejudicial.

No error.

ELIZABETH CITY HOTEL CORPORATION v. M. N. TOXEY.

(Filed 11 September, 1929.)

APPEAL by defendant from an order of *Devin, J.,* made on 31 May, 1929, permitting the defendant, upon affidavit filed, to inspect certain documents and papers of the plaintiff, together with the minutes of the corporation and the defendant's subscription to stock, and to examine W. G. Gaither and C. O. Robinson, officers of the corporation. From PASQUOTANK. Affirmed.

McMullan & LeRoy for plaintiff.
Aydlett & Simpson for defendant.

PER CURIAM. The defendant contends that his Honor's order is unduly restricted, but we are of opinion that it substantially recognizes all the material and determinative allegations in the defendant's affidavit, and that defendant has no just cause of complaint. The order allowing the examination is

Affirmed.

GEORGE MORRIS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 11 September, 1929.)

CIVIL ACTION, before *Moore, Special Judge* at June Term, 1929, of PASQUOTANK.

Plaintiff alleged that on or about 1 April, 1912, he suffered the loss of his foot by reason of being struck and run over by a train owned and operated by the defendant. At the time of the injury plaintiff was a minor eight years and four months of age. The track of defendant crosses Culpepper Street within the corporate limits of Elizabeth City. At the time of the injury this was a much used and populous thoroughfare.

Plaintiff offered evidence tending to show that while he and other colored boys were playing in Culpepper Street he attempted to run across the track of defendant, stumbled and fell across the track, and was run over by box cars pushed by an engine. The evidence further tended to show that the right of way of defendant at the intersection was obstructed by weeds and a building; that no signal was given by the engine as it approached the crossing, and that there was no lookout on the box car.

The evidence of defendant tended to show that the plaintiff was attempting to board a moving train, missed his footing, and fell under the train.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The issue of damages was answered in the sum of $2,000.

From judgment on the verdict the defendant appealed.

W. L. Cohoon and Ehringhaus & Hall for plaintiff.
Thompson & Wilson for defendant.

PER CURIAM. There was evidence of negligence and strong evidence of contributory negligence. However, the material conflict in the testimony created issues of fact. It was therefore necessary to submit the case to the jury. The verdict establishes facts imposing liability, and no error of law appears in the record. *Hoggard v. R. R.,* 194 N. C., 256, 139 S. E., 372; *Brown v. R. R.,* 195 N. C., 699, 140 S. E., 622.

Affirmed.

E. C. WEST v. NATHAN JOHNSON AND JOHNSON COTTON COMPANY.

(Filed 25 September, 1929.)

APPEAL by defendants from *Lyon, Emergency Judge,* and a jury, at April Term, 1929, of HARNETT. No error.

Clifford & Williams for plaintiff.
James Best and R. L. Godwin for defendants.

PER CURIAM. Plaintiff brings this action against defendants, alleging a written agreement between them, a performance on his part and a breach on the part of defendants. Defendants were to furnish plaintiff notes, judgments, accounts, etc., for plaintiff to collect on a basis of 25%. The plaintiff demanded judgment against defendants for $969.25, and interest.

The issues submitted to the jury and their answer thereto was as follows:

"Is the defendant due the plaintiff anything; if so, in what amount? Answer: $450 with interest."

From a careful inspection of the record, we do not think there is sufficient cause shown to disturb the verdict and judgment.

No error.

IN THE MATTER OF THE WILL OF M. IDA GULLEY.

(Filed 25 September, 1929.)

APPEAL by propounders from *Grady, J.,* at April Term, 1929, of WAYNE. No error.

Proceedings upon a caveat to the probate in common form of a paper-writing as the last will and testament of Mrs. M. Ida Gulley.

The caveator alleged that the paper-writing propounded as the last will and testament of Mrs. M. Ida Gulley is not her will for that (1) the execution thereof was procured by the undue influence of the beneficiaries named therein, and (2) for that at the date of the execution of said paper-writing, Mrs. M. Ida Gulley did not have sufficient mental capacity to make and execute a will.

The issues submitted to the jury were answered in accordance with the contentions of the caveator.

From judgment in accordance with the verdict, the propounders appealed to the Supreme Court.

Dickinson & Freeman for propounders.
Kenneth C. Royall and J. Faison Thomson for caveators.

PER CURIAM. An examination of the record in this appeal does not disclose prejudicial error in any decision by the court below in a matter of law or legal inference for which a new trial should be ordered by this Court.

The evidence pertinent to the questions involved in the determinative issues was submitted to the jury under instructions which are in accord with authoritative decisions of this Court. This evidence, consisting largely of the diverse opinions of witnesses, as is usual in proceedings of this nature, was conflicting. The jury having answered the issues contrary to the contentions of the propounders, the judgment in accordance with the verdict must be affirmed. We find

No error.

H. P. WHITEHURST, RECEIVER OF THE BANK OF VANCEBORO, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, G. A. GRIMSLEY, TRUSTEE, L. E. SMITH AND WIFE, LYDIA C. SMITH, AND T. J. MARRINER, TRUSTEE IN BANKRUPTCY OF L. E. SMITH.

(Filed 2 October, 1929.)

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1929, of CRAVEN. Affirmed.

Henry P. Whitehurst and Ward & Ward for plaintiff.
Brooks, Parker, Smith & Wharton and Warren & Warren for Jefferson Standard Life Insurance Company and G. A. Grimsley, trustee.
Guion & Guion for L. E. and Lydia C. Smith.

PER CURIAM. This is an injunction proceeding to restrain the sale of certain land by George A. Grimsley, trustee. The court below by agreement found the facts. The conclusions of law were as follows:

"1. That Lydia C. Smith was surety only on the note of her husband, L. E. Smith, to the Security Life and Annuity Company.

2. That Lydia C. Smith, wife of L. E. Smith and beneficiary in the life insurance policy, has a vested interest and property therein.

3. That the equitable doctrine invoked by the plaintiff does not apply.

4. That restraining order should be dissolved."

We have read the record and briefs carefully. We are of the opinion that the judgment of the court below was correct.

Affirmed.

GEORGE W. WILSON v. M. W. COOPER ET AL.

(Filed 2 October, 1929.)

APPEAL by plaintiff from *Nunn, J.*, at June Term, 1929, of LENOIR.

Civil action by plaintiff, employee, to recover of M. W. Cooper & Co., road contractors, the sum of $2,431.90 for services rendered and work done in and about the construction of a highway in Lenoir County.

Plaintiff alleges that M. W. Cooper & Co. is a partnership composed of M. W. Cooper and S. Strudwick. This is denied by S. Strudwick. Judgment by default final was rendered against M. W. Cooper for want of an answer. On the controverted issue as to whether S. Strudwick was a member of the alleged partnership, the jury answered in favor of said defendant. Plaintiff appeals, assigning errors.

Shaw & Jones for plaintiff.
P. D. Croom for defendant.

PER CURIAM. The controversy on trial narrowed itself to an issue of fact, determinable alone by a jury. It has answered the issue in favor of the defendant, S. Strudwick, and we have found no error in the trial. The verdict and judgment will be upheld.

No error.

JAMES B. BAREFOOT v. C. E. UNDERWOOD, C. DUDLEY DUGOSE, PARTNERS, TRADING AS UNDERWOOD MOTOR COMPANY, R. P. JACKSON, AND R. E. WEST.

(Filed 9 October, 1929.)

APPEAL by plaintiff from *Daniels, J.*, at August Term, 1929, of SAMPSON. Affirmed.

C. L. Guy and R. L. Godwin for plaintiff.
Butler & Butler, Faircloth & Fisher and E. C. Robinson for defendants.

PER CURIAM. The following judgment was rendered by the court below:

"This cause coming on to be heard, . . . and after reading the pleadings the defendants move the court for an order dismissing plaintiff's action on the ground set out in the second defense in the answer; that there has been a former trial, and judgment between the parties adjudicating the matter disclosed by the pleadings and set up a formal plea of *res adjudicata*, and the court from an inspection of the pleadings in this case and an inspection of the pleadings in a former case between James B. Barefoot and The Underwood Motor Company, and the issues and judgment and entries in said former suit and the order of Judge Harris in said former suit, and being admitted that there is no other concern by the name of the Underwood Motor Company, except the Underwood Motor Company referred to in these actions, and the partners composing the Underwood Motor Company appeared in court, employed counsel and defended said action, and the court further finding that the defendants in this action, to wit, R. P. Jackson and R. E. West, were only the agents and employees of the Underwood Motor Company. It is thereupon, on motion of the defendants, considered, ordered and adjudged that the plaintiff is estopped by the former judgment roll in the case of James B. Barefoot *v.* Underwood Motor Company, and that the plaintiff's action is dismissed."

We think there was evidence sufficient for the court below to find the facts as set forth in the judgment. The judgment below is

Affirmed.

O. E. GOODWIN v. DURHAM & SOUTHERN RAILWAY COMPANY.

(Filed 23 October, 1929.)

APPEAL by plaintiff from *Sink, Special Judge,* at April Term, 1929, of DURHAM. Affirmed.

Action to recover damages for the negligent killing of plaintiff's horses.

At the close of the evidence for the plaintiff, there was a judgment dismissing the action as upon nonsuit. From this judgment plaintiff appealed to the Supreme Court.

J. Grover Lee and L. P. McLendon for plaintiff.
Fuller, Reade & Fuller for defendant.

PER CURIAM. The evidence offered by plaintiff upon the trial of this action, viewed in the light most favorable to him, in accordance with the well established rule in this jurisdiction, fails to sustain the allegations of plaintiffs that his horses were killed by the negligence of defendant. There was no error in the judgment dismissing the action as upon nonsuit. The judgment is

Affirmed.

T. R. THOMPSON ET UX. v. N. A. CURRIE & COMPANY, INC.

(Filed 23 October, 1929.)

APPEAL by plaintiffs from *Cranmer, J.,* at April Term, 1929, of BLADEN. No error.

Action to enjoin foreclosure of mortgage on land, upon allegation that the debt secured thereby had been paid. Defendant denied the allegation, and prayed for judgment on the debt, and for decree of foreclosure.

The issue submitted to the jury was answered as follows: "In what sum, if any, are plaintiffs indebted to the defendant on note and mortgage described in the pleadings? Answer: $753.06, and interest to date."

From judgment on the verdict, and decree of foreclosure of the mortgage, plaintiffs appealed to the Supreme Court.

F. D. Hackett, Jr., for plaintiffs.
H. H. Clark for defendant.

PER CURIAM. Plaintiffs' assignments of error on their appeal to this Court cannot be sustained.

The receipt offered in evidence by the plaintiffs shows on its face that the money, to wit, the sum of $1,162.62, for which it was issued was paid by plaintiffs to defendant in settlement of plaintiffs' account with defendant. There was no contention that plaintiffs have paid to defendant any other money than that shown by the receipt. Plaintiffs kept the receipt as written for nearly nine years, before contending that they had paid the note secured by the mortgage and that the receipt was evidence of such payment. They do not now contend that there was any mistake or fraud in the receipt. The instruction of the court with respect to the receipt cannot be held for reversible error.

The issue submitted to the jury involved only a question of fact. This question was submitted to the jury in a charge which we think is not subject to the exception that the court failed to comply with C. S., 564. The judgment is affirmed.

No error.

O. O. SNOW ET UX. v. W. C. LOMAN.

(Filed 6 November, 1929.)

APPEAL by defendant from *Finley, J.*, at June Term, 1929, of FORSYTH.

Civil action tried upon the following determinative issues:

"Were the plaintiffs induced by the fraud of the defendant to sell and convey their property and to accept as part payment therefor the $5,500 note, as alleged in the complaint? Answer: Yes.

What amount, if any, are the plaintiffs entitled to recover of the defendant? Answer: $5,397, with interest from 10 February, 1928."

From a judgment on the verdict the defendant appeals, assigning errors.

Ratcliff, Hudson & Ferrell for plaintiffs.
Parrish & Deal for defendant.

PER CURIAM. The principal question presented by the appeal is the sufficiency of the evidence to support the issue of fraud. A careful perusal of the record leaves us with the impression that the evidence in this regard, while slight, was such as to require its submission to the jury. It would serve no useful purpose to set out the testimony of the witnesses in detail, as the chief question presented is whether it is sufficient to carry the case to the jury, and we think it is.

The verdict and judgment will be upheld.

No error.

RUFUS ISENHOUR AND G. M. ISENHOUR, TRADING AND DOING BUSINESS AS YADKIN BRICK YARDS, v. J. W. KIMBALL AND WIFE, CORDIE E. KIMBALL.

(Filed 20 November, 1929.)

APPEAL by defendant, Mrs. Cordie E. Kimball, from *Shaw, J.*, at May Term, 1929, of STANLY.

Civil action to recover for materials purchased from plaintiffs and used by J. W. Kimball in his contracting business, and to hold Mrs. Cordie E. Kimball liable therefor as partner with her husband in said business.

From a verdict and judgment in favor of plaintiffs, the *feme* defendant appeals, assigning errors.

R. L. Smith & Sons for plaintiffs.

Brown & Sikes and Armfield, Sherrin & Barnhardt for defendants.

PER CURIAM. A careful perusal of the record leaves us with the impression that the evidence is not sufficient to hold the *feme* defendant liable, as a partner with her husband, for the plaintiffs' claim. It follows, therefore, that the appellant's motion for judgment of nonsuit should have been allowed.

It would serve no useful purpose to set out the evidence in detail, as we deem it insufficient to support a finding of partnership, and this renders the other questions academic.

Reversed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Garysburg Manufacturing Company v. Board of Commissioners of Pender County. Dismissed for reason that judgment of State Court sought to be reviewed was based on non-Federal ground.

PRESENTATION OF THE PORTRAIT

OF THE CLERK OF THE SUPREME COURT
OF NORTH CAROLINA, 1868-1886

MAJOR WILLIAM HENRY BAGLEY

ADDRESS BY

CHARLES WHEDBEE
OF PERQUIMANS COUNTY

MAY 14TH, 1929

May it please the Court:

As a representative of Perquimans County, and as a friend of the family, it is my privilege to present to you today a portrait of Major William Henry Bagley, a son of Perquimans and one of her contributions to the State's history.

As a representative of Perquimans County, may I indulge for a few moments in recalling briefly the historic and characteristic background of the people and the county from which the subject of my sketch came?

With its fertile acres stretching back on each side of the beautiful stream which bears its name, the county of Perquimans is nestled near the center of that tier of counties in northeastern North Carolina, lying north of the Chowan River and Albemarle Sound, and adjoining the State of Virginia and the Atlantic Ocean, sometimes referred to in modern times as the lost provinces of the east. Each of these counties has its facts of historic interest of which it is justly proud, and not unlike her sisters, Perquimans has her facts of history to which she points with pride, but not with boastfulness. The records of her sons, the Harveys, the Durants, the Skinners, the Bagleys, the Blounts and others, are blazoned in the annals of the early history of the State. The first religious service held in North Carolina was held at Phelps Point, now Hertford, by Hugh Edmonson, and a tablet marking the spot and giving the data will be dedicated with appropriate ceremonies by the Friends on 11 June next. There are many other matters of historic interest that cluster about this good county. But while we are justly proud of the facts of historic interest, we are more proud of the characteristics of her people. Her people are kindly and retiring; they believe to every one should be accorded his just due; they are long suffering and patient, but when once aroused and feel that their rights have been improperly taken from or denied them, they will fight a rattle-snake and give him the first strike. These characteristics are quite aptly illustrated by two incidents in the life of George Durant, one of the early settlers and one of the leaders of that section; one is when Durant came to settle in Perquimans County, instead of taking the land, as was the usual wont in that day, he bargained with and bought the land from the Indians, and the deed of the King of the Yeopims, on record in Perquimans County, recites that the King conveyed the land with the consent of his people. So well and faithfully did George Durant deal with the Indian that John Durant, son of George, was elected honorary King of the Yeopims. This incident, I think, aptly illustrates the kindly and just attributes of her people. The other incident relates to the time when Miller, a representative of the King of England, came to Perquimans County and denied to her citizens certain rights that they had rightfully been enjoying. George Durant pleaded with Miller to allow the people to exercise these rights and privileges, and so insistent did he become that Miller ordered Durant's arrest; but outwitting Miller, Durant called a meeting of the leading men of the realm and had himself appointed Attorney-General of North Carolina. Immediately he brought an indictment against Miller, with the result that he was banished from the realm under pain of being hung for high crimes and misdemeanors should he return to the community.

Of this community, with this historic and characteristic background the Bagley family was a part, and with these ideals firmly imbedded in his nature, the subject of my sketch was born on the banks of the beautiful Perquimans River, which he loved so devotedly all his life.

Among the earlier settlers in this county we find the Bagleys, and the records disclose that from a very early period they took an active part in the civic and official life of the county. We find them filling the offices of sheriff, Clerk and Master in Equity, Justice of the County Court and similar positions; later we find them active in the Masonic Order.

The first American paternal ancestor of Major William Henry Bagley of which we have a record, was Thomas Bagley, who died in July, 1727 and devised to his son Thomas the plantation on which he lived; to hi son William the land on Great Branch, and other property to hi daughter Hanna, and his wife Susannah; a grandson of this Thoma Bagley, another Thomas, fought in the Revolutionary War; his son William fought in the War of 1812. William Bagley married Dina Holmes, daughter of William Holmes and Ann Gregory. Their son Willis Holmes Bagley, was born 15 March, 1808; in 1828 he marrie Mary Elizabeth Clary, daughter of James Clary and Susannah Scarborough. Twelve children were born to them, of whom five attaine mature age, William Henry, subject of this address, the eldest; Stephe D. Bagley, educator, was born in 1840; Willis Bagley, attorney, wa born in 1845; Grizelle Clary Bagley was born in 1847, and Leroy C Bagley, who was born in 1849. Those were the only children who live to maturity and married.

Stephen was a lieutenant in the Confederate Army, serving throug the war with Company A of the Eighth North Carolina Regiment. H was at one time principal of the Littleton Female College, and was later president of the Louisburg Female College for Women.

Willis Bagley, at the age of 18, was principal of Hertford Academy; at 26 he was appointed Solicitor of the First Judicial District of North Carolina, and later became Assistant United States District Attorney. During the last illness of his brother, Major Bagley, he filled, unofficially, but with credit, the place of Clerk of the Supreme Court.

Grizelle Bagley became the wife of Mr. Benjamin Moffitt, cotton mill president at Franklinville, Randolph County, and died 6 April, 1902.

Leroy G. Bagley, accountant, married Miss Minnie Haywood, of Raleigh. He died in 1888.

On his mother's side Major Bagley was descended from the well known Scarborough family of Virginia and North Carolina. The line goes back to William Scarborough, who married Frances McRora, in Middlesex County, Virginia, in 1691. Their son, McRora Scarborough, was a member of the Colonial Council and a colonel in "His Majesty's" Militia. In 1729 he married Anna Peterson, daughter of Thomas Peterson, who owned the land upon which Edenton is built, and Johannah Taylor. Their son, Benjamin Scarborough, married Sarah Long, daughter of Thomas and Susannah Long. Susannah Scarborough, their daughter, became the wife of James Clary, son of William Clary. Willis Holmes Bagley, father of Major Bagley, married their daughter, Mary Elizabeth Clary.

Major Bagley's mother and father lived only a short time after the Civil War. He was devoted to them both, and his mother particularly made a deep impress on his whole life. She was a woman of decided personality and strength of character. During her last illness she kept in touch with and discussed intelligently current events. Major Bagley, when he was away from home, and after he moved to Raleigh, wrote her constantly, and particularly he never let his own birthday pass without writing her a letter.

It may be of interest to pause just here and note the record of both sides of Major Bagley's family made about 100 years ago: In the will of William Bagley in 1826 he devises, "to my son the land whereon I live and the still erected thereon to him and his heirs forever." In the will of John Clary, in 1825, he devises, "to my son all the lots and common grounds and the improvements thereon I own in the town of Hertford. The whiskey apparatus alone excepted." We can judge from the attitude of the two branches of the family that the mother well might be the guiding star in the succeeding generations.

William Henry Bagley was born in Perquimans County on 5 July, 1833, at the home of his father, Col. Willis Holmes Bagley, on the banks of Perquimans River. Colonel Bagley was a popular and influential citizen of the county, having been sheriff, and was also Grand Master of the Masons. His portrait hangs today in the Masonic Hall in the historic courthouse of Perquimans County. William Henry received his early education or instruction from Rev. Benjamin F. Bronson, a scholarly divine of the Episcopal Church, and long a rector at Wilson, North Carolina, and a liberal education at the academy located in Hertford under the able and accomplished instruction of Professor John Kimberley, afterwards a professor at the University of North Carolina. The boy showed remarkable precocity, for at the age of 19 he was register of deeds of Perquimans County. He moved to Elizabeth City in 1855 and became the editor of a paper called *The Sentinel.* In 1859 he was licensed to practice law, but the appeal of journalism was still strong in him, for in 1860, with Colonel James W. Hinton, he became co-editor of *The State.* He was afterwards editor of a paper which supported the American Party, which became strong for a period in northeastern North Carolina, with the passing of the Whig party, of which the Bagleys were members.

Then came the Civil War. He immediately enlisted as a private and was, on 15 May, 1861, commissioned lieutenant of Company A, Eighth Regiment North Carolina Troops. On 8 February, 1862, he fought in the battle which resulted in the capture of Roanoke Island, and was captured by the Federals. After exchange of prisoners he was, on 25 October, 1862, commissioned Captain of Company A, Eighth Regiment. In April, 1864, he was transferred to the 68th Regiment North Carolina Troops, and was commissioned major on 16 April, 1864. He resigned as major on 11 June, 1864, in order to serve as Senator from Perquimans and Pasquotank counties, to which office he had been elected. This was his second term as State Senator. In July, 1865, President Johnson appointed Major Bagley as superintendent of the United States Mint at Charlotte, but Major Bagley was not able to take the "Ironclad" oath required, and this office passed into other hands. In that year, however, Jonathan Worth, in the first vote of the people after the war, wa elected Governor, and he made the young man from Perquimans hi private secretary, and on 1 March, 1866, Major Bagley and Adelaide Ann, daughter of Governor Worth, were married.

In January, 1869, after a governor, supported by Federal bayonets had supplanted the governor elected by native ballots, Governor Worth wrote his brother:

"There is now a strong probability that Major Bagley, who has been on his oars for six months, will be elected Clerk of the Supreme Court This office is worth at least $3,000 a year. He is admirably fitted t fill it, and would be likely to retain it permanently." Governor Worth whose influence counted heavily for Major Bagley, was right. Majo Bagley was elected, and he loved the office, and held it when Pearso was Chief Justice, and when Smith presided over the Court, and "permanently" until his death.

In those days the Supreme Court had its court room and its chambers n the State Capitol. Major Bagley's office is now occupied by the Secretary of State. Outside the windows was the Capitol Square, informally lovely behind its old iron fence. He loved it. It became part of him, its huge oaks, the sweet grass which grew about their roots, the birds that sang there every spring and summer. There is a legend that it was he who brought the squirrels, the ancient ancestors of those squirrels there today eating peanuts timidly from the delighted children. In hat office in his fine legible hand he kept the clear record of the Court. There were not so many assistants as there are today. A woman stenographer would have been something approaching the scandalous.

But the records were kept neatly, accurately, and filed in high cabinets along the walls. In office Major Bagley was cordial and courteous to attorneys who came from all parts of the State to appear before the Court. He held the respect and regard of the Justices of the Court. Particularly he loved to hand the parchment licenses to newly fledged young lawyers, and if these young fellows in post-war poverty lacked he clerk's fee, Major Bagley was glad to wait. One successful New York attorney sent to Major Bagley's widow, after his death, the fee which the Major had waived when the young man, then poor, received his license. Major Bagley was happy in the place where life had put him.

There have been many changes in the personnel of the Court since its organization in 1819, but there have been only seven clerks during that time. The first Clerk was William Robards, who served from 1819 to 1828. He was succeeded by John Lawson Henderson, who served from 1828 to 1843. He in turn was succeeded by Edmund B. Freeman, who held office from 1843 to 1868. He was succeeded by Major William Henry Bagley, who held office from 1868 to 1886. He was succeeded by Colonel Thomas S. Kenan, who held office from 1886 to 1911. He was succeeded by Joseph Seawell, from 1911 to 1923, and he was succeeded by Edward C. Seawell, who now holds the position of Clerk.

At the time of the appointment of Major Bagley the Court consisted of Richmond M. Pearson, Chief Justice, and Associate Justices Edwin G. Reade, William B. Rodman, Robert P. Dick, and Thomas Settle.

Settle resigned in 1871, and Governor Caldwell appointed Nathaniel Boyden to succeed him.

Dick resigned in 1872 to become United States District Judge of the Western North Carolina District. Thomas Settle came back on the Court as his successor.

Boyden died in November, 1873, and William P. Bynum was appointed to succeed him.

Thomas Settle resigned again in 1876, and William T. Faircloth was appointed to succeed him.

Chief Justice Pearson died in 1877, and on 14 January, 1878, Governor Vance appointed W. N. H. Smith to succeed him.

In August, 1878, a Court of three (the size being reduced from five to three) was composed as follows: W. N. H. Smith, Chief Justice, and Thomas S. Ashe and John H. Dillard Associates.

Dillard resigned in 1881, and Governor Jarvis appointed Thomas Ruffin to succeed him.

Ruffin resigned on 29 September, 1883, and Augustus S. Merrimon was appointed to succeed him.

At the time of Major Bagley's death, 21 February, 1886, the Court was composed as follows: W. N. H. Smith, Chief Justice, and Thomas S. Ashe and Augustus S. Merrimon, Associates.

We may be pardoned for paraphrasing a well known poem and say: Courts may come and courts may go, but a clerk, if faithful, as was Major Bagley, holds on "forever."

During Major Bagley's last illness the duties of Clerk were carried on by his brother, Willis Bagley, of Jackson, N. C.

After Major Bagley's death Chief Justice Smith wrote Willis Bagley: "Your brief note has been received this morning, and we are glad to give you our appreciation and approval of the manner in which during the illness of your brother, our late Clerk, you have discharged the onerous and responsible duties of the office. The Court desires me in giving this assurance to request that you will continue to perform these duties until a successor has been appointed and conducted into office."

A short time later Colonel Thomas S. Kenan, former Attorney-General, was elected Clerk and served for many years.

Shortly after Major Bagley became Clerk of the Supreme Court that Court faced the situation created by the activities of Governor Holden and his armed emissaries under the infamous Kirk.

Major Bagley, as Clerk, had no discretionary part in that thrilling episode, but he must have been stirred, as were other North Carolinians in that crisis, although his place as Clerk made him refrain from expressing his feelings. The action of Chief Justice Pearson and the action of Judge Brooks, from our own bailiwick, is history with which all of us are familiar, and is another example of the characteristics of our people to which we point with pride, but not with boastfulness.

There was a large trekking of North Carolina Quakers and others from Guilford and Randolph counties in the central part of the State, and from Perquimans in the east to Indiana and other Western States in the early fifties and earlier—some following the lure of cheap, rich new lands, some because not believing in slavery they wished to live in a non-slave holding State; some for perhaps both reasons. Among those going from Guilford and Randolph were the parents of Hon. Joseph G. Cannon, afterwards Speaker of the House. Among others going from Guilford and Randolph were two sisters of Jonathan Worth, father of Major Bagley's wife.

From Perquimans there went to Indiana members of the Nathan Bagley family and settled in same section where the Guilford and Randolph Friends had made their homes. In those days it was a far cry from Perquimans to Randolph, without good highways or railroads or other means of communication, there was more intercourse between Hertford and New York than between Perquimans and Guilford, though there was early exchange of greetings through traveling delegates to the various Friends assemblies in different parts of the State. After visiting eastern North Carolina, following in the footsteps of Hugh Edmonson, who preceded him, John Fox visited the Friends meeting-houses in Guilford and Randolph. But between the people generally of the two sections it was as if a great gulf was fixed.

It is not so remarkable that going to Raleigh as a Senator in the days of the war, that William Henry Bagley, young, unmarried and eligible, should meet the daughters of Governor Worth, nor remarkable or surprising that a union between the Bagleys and Worths should follow by the marriage of Major Bagley and Miss Adelaide Ann Worth. It was but natural that the young Senator in the days after Appomattox should be invited to the social functions of the capital city, making a brave attempt to restore the social life of the older and more prosperous days. Raleigh has always been a center of social activities in North Carolina, though without the settings, surroundings and refreshments that characterized the days of former prosperity, youth could not be denied its pleasures because calico reigned in the place of silk and satin. Raleigh was gay in those days, when Major Bagley and other young men fresh from the war, and Miss Worth and other young women, suffering the privations of war, met in the hospitable homes, no less hospitable because there was enforced absence of luxuries. There was no event celebrated with more eclat than when Governor Worth's daughter and the Senator from Perquimans were married in the First Presbyterian Church. If the trousseau and flowers were simpler than in these days, the bells rang as merrily and marriage then, as later, was "one grand sweet song."

It was, however, a much further cry from Perquimans to the Quaker settlement in Indiana than from Perquimans to Randolph, which witnessed the union of the Worth and Bagley families. But truth is stranger than fiction. The Reuben Bagley family of the succeeding generation from Perquimans in Indiana became the friends of the descendants of the Worths from Randolph. Later the family friendship ripened and the descendants of the Perquimans Bagleys and the Randolph Worths plighted their troth in holy matrimony in far off Indiana as another

Perquimans Bagley and Randolph Worth had done in Raleigh in 186
This seemed to evidence some sort of magnetic attraction by which lo
leaped barriers of space and territory and time, as it has a way of doi

Called to Indiana to deliver the address at Earlham College, an ins
tution founded by the Friends and at one time presided over by Dav
Worth Dennis, kinsman of Jonathan Worth of Randolph, Joseph
Daniels, who had married Addie Worth Bagley, daughter of Maj
Bagley, and granddaughter of Governor Jonathan Worth, visited re
tives of his wife—Worth descendants. At one home near Richmo
Indiana, he met a lady who had married a cousin of his wife. "M
family also came from North Carolina," she said to Mr. Daniels. "Th
were of the Nathan Bagley stock of Perquimans County." She had n
known of the intermarriage of the Bagleys and Worths in North Ca
lina. Mr. Daniels did not then know of the Nathan Bagleys of P
quimans County. It was rather a strange coincidence that these t
families, who had not either known or known of each other in Nor
Carolina, should constitute another chain in the marriage relations
the Bagleys and Worths.

This incident shows how little one generation can look into the futu
and recalls an incident related by Dr. C. Alphonso Smith in presenti
the tablet of O. Henry, which was unveiled in this building, appropri
here because it concerned the Worth family: "Dr. David Worth, fath
of Ruth, made minute inquiries into the past of his would-be son-in-l
(Sidney Porter), and became convinced, writes a descendant, that 'M
Porter was a man of strictly upright character and worthy of
daughter's hand.' The marriage took place at Center, the ancest
home of the Worths, on 22 April, 1824, and was really a double celeb
tion. Ruth Worth's brother, Jonathan, who was later to become G
ernor of North Carolina, had married Martitia Daniel, of Virginia, t
days before, and the brother's infare served as a wedding reception for
sister. It was a notable occasion for the little Quaker village in m
ways than mere festivity. Could I have been present when the inf
was at its height, when congratulations and prophecy were bringing th
blended tributes to father and mother, and to son and daughter, I sho
not have been an unwelcome visitor, I think, could I have lifted the v
of the future for the moment and said to Dr. Worth and his wi
'Eighty years from now a statue will be dedicated in the capital
North Carolina to one of Jonathan Worth's grandsons, the first sta
to be erected by popular subscription to a North Carolina soldier, a
the name engraved on it will be that of Worth Bagley, and ninety ye
from today a memorial tablet will be dedicated in the same city to
of Ruth's grandsons, the only monument ever erected in the State t
literary genius, and the name engraved upon it will be that of Willi

Sidney Porter.' But the roads of destiny along which the two cousins were to travel to their memorial meeting place were to be strangely diverse."

I might go on and recount a great many incidents in the lives of these two families from their earliest settings in Perquimans and in Randolph and many of them would prove interesting and instructive reading, but I desire now to speak more particularly of Major Bagley himself and his life in Raleigh. It was here that his last days were spent, and here it was that he served as Clerk to this Court.

Life to Major Bagley was a gracious and beautiful thing. And in that life he was such a one as we now too seldom see—a man content with his world, bent on blessing his own sphere and making it beautiful, undisturbed by the driving madness that has come in these later years tending to rob leisure of its grace and living of its dignity. He was a man content, but content only because he had found beauty and happiness at the center of the circle of his personal and official life, making it only folly to go seeking upon tangents more flamboyant, or satisfactions more startling.

Raleigh people thought it strange that he was not born in Raleigh—he became so definitely a part of it. Every man, woman and child in the city, which was then an oak-shaded town of six thousand persons, knew him and loved him. To every one he was the "Major." Picture him now moving along the streets of that pretentious town which insisted it was a city. Erect, with his immaculate beard trimmed in smart precision, he walked like a soldier along those sidewalks of foot-packed earth between the encroaching grass. People saw him coming, and accepted his joyous greeting with a rising sense of friendliness in their own hearts. Each day he walked from his office in the capitol down the wide, shaded Fayetteville street, to its foot and the old Governor's palace, now turned into a school, and east two blocks to his own house on South street. He loved that house with the two great oaks that shaded it and the magnolia trees at its door.

Inside the house would be his wife, the lovely Adelaide Ann, his three daughters, Adelaide, now Mrs. Josephus Daniels, Belle and Ethel, and his three sons Worth, later to be known as Ensign Worth Bagley, the first fallen of Naval officers in the Spanish War, and whose monument now stands on the capitol square, William Henry, now a journalist of Fort Worth, Texas, and David, now Captain David Worth Bagley, U. S. Navy. There would be a satisfying fragrance in the house part of the roses from the garden under his bedroom, and part from the aroma of supper coming from the detached kitchen behind the rambling house. There would be something for supper that a friend had sent or that he had bought that morning in the big cool market on Fayetteville street. There might be partridges, wild turkey or best of all, shad or oysters from the eastern country where he was born and which he loved. After supper perhaps Ethel played on her violin, or Belle would be at the piano, and they would all sing together contemporaneous songs, one of the dearer hymns, and finally always the rollicking political battle song which the Major himself had written when the presidential campaign of Greely stirred his heart. I am giving you herewith two of the verses of the battle song:

CINCINNATI.

They went from the EAST and they went from the WEST,
Sent there by the people who love the land best;
The NORTH and the SOUTH had gathered there, too,
United once more "'neath the red, white and blue."

They are crossing "the chasm"—"the BLUE and the GRAY,"
And soon the two colors will mingle away;
God bless the "OLD FARMER," and long may he live,
To teach a brave people, "FORGET AND FORGIVE!"

CHORUS.

Then, Hip! hip!! hurrah!!!
For the HERO so true,
Who clasps the GRAY hand
In that of the BLUE!

And afterwards, when the children were in bed, there would be the *New York Herald*. But there would be other nights—cold nights, when the mud would be jagged steel—when he would go out with basket or with buggy piled with provisions or firewood on errands that satisfied his heart. Once he broke his leg in the sleet when he was carrying a load of wood to an old negro servant. But usually he came back whistling a little, to read his *New York Herald*, or to talk to his wife of things that happened at the capitol that day. He came to love Raleigh as he ever loved the sweep of the broad and beautiful Perquimans River, on which his infant eyes opened, and where in boyhood he swam and fished and boated. Up to his last days he often spoke with the sincerest affection of his happy boyhood days on the banks or the bosom of the Perquimans and of his early manhood on the banks of the Pasquotank. The love of the waters of the section where he was born, the spirit of its people, its history and tradition, were part of his very being. In his latter days in the bed of sorrow he often sighed for a sight of the rivers "his ain country," and delighted in living over again the incidents that made his early home and companions dear to him. He became so much a part of Raleigh, he came to love it for his own, and it loved him. Life was so beautiful. He tasted it so gracefully, so thankfully. It seemed to be no part of the story begun, that his life had to be cut off in agony and tragedy. And yet there was a time when Raleigh hardly knew him. That was the time when sturdy, sober old Jonathan Worth sat down at his desk and wrote a letter to his friend, John Pool, prominent then in the eastern part of the State:

"I desire, in strictest confidence, to make an inquiry of you, which it may be unpleasant to you to answer. If so, I will not complain of your silence.

"I learn from one of my daughters that Major Bagley, Senator from Pasquotank and Perquimans, has asked leave to address her. I do not know enough of him to approve his suit till I know more about him. My daughter is young, intelligent, well educated and in every way fitted to be the wife of an intelligent, energetic and virtuous husband. You will treat this as a just description, not springing from excess of parental affections. My fortune is not large and I have many children, and consequently she can receive but a moderate outfit from me. Will you favor me in perfect candor, and in strictest confidence, the information I ought to have. Sober and virtuous habits, intelligence and capacity to make a living are qualities without which no one is deserving of my approval." We have no way of knowing what John Pool answered; his letter has been lost, but we do know the facts which would have built his answer.

As he loved life, so he loved men and cherished the fraternity of men, one of the great interests of his life was his devotion to Odd Fellowship. As a young man be became a member of Anchorre Lodge, No. 14, at Elizabeth City. In 1865, when he moved to Raleigh, he affiliated with Seaton Gales Lodge, No. 64, and McKee Encampment No. 15. In 1871 he entered the Grand Lodge, and the next year he was chosen grand master. He was elected grand representative to the Grand Lodge of the United States in 1874; he was reëlected in 1875 and again in 1877. During his lifetime he held every office in the gift of the fraternity in the State. He continued to be prominent in the affairs of the order until his death. His attitude toward religion was deep and reverent. The Bagleys were Methodists, but most often Major Bagley went with his wife to the Presbyterian Church, to which the Worths had gone when Jonathan Worth's marriage to a non-Quaker had resulted in his being dropped from the church rolls of the then ultra rigid Friends. Major Bagley was a protestant, but above all he was a Christian. One who loved him remembers his friendship for a young Catholic priest who had come to North Carolina with an empire for a diocese and a scattered few for a flock. No one dreamed in that day the priest would one day wear the red hat of a Cardinal, as Cardinal Gibbons, but Major Bagley knew him and liked him, because he was a sweet-souled man following an ideal in a country where his ideal had but few followers.

While the office of Clerk provided a competence for Major Bagley and his family, he had good business foresight and made wise investments, but like many of his time he, too, signed with a friend and paid to the last penny, leaving him only his office and his insurance. He paid without ever a word of reproach. He was the mould of man Stevenson had in mind when he said they could "renounce when that shall be necessary and not be embittered." He went smiling down the street, and few knew of the privations he bore in order to meet the obligations assumed for a friend. All the time he was smiling and cordial, friendly and helpful. People loved to see him coming down the street with smiling eyes.

And then one day the life he had loved added savagery to the troubles he had borne, added to it in the most casual way. The negro barber who had served him for years was trimming his beard and remarked, "Major Bagley, there's a little lump on your throat here right under the chin."

And that was all. But two months later Dr. E. Burke Haywood, perfect friend and perfect physician, went with him and his wife to Baltimore. Major Bagley wore a handkerchief around his throat where his collar had been, but he held his head like a soldier, and the same smile lived in his eyes. But there had come a sudden gray in the gold hair of Adelaide Worth. She loved him and she lacked the spirit he had for smiling.

The great doctors at Baltimore were kind, so kind and so helpless and so sorry to have to be frank. There had been examinations and consultations. The Bagleys, man and wife, waited bravely in a boarding-house desperately afraid of each other's unhappiness. They made a gallant show to shield each other. Then the great doctor told her:

"You must go home. There is nothing we can do. Nothing anybody can do. I am so sorry. You will just have to wait. There isn't any hope."

She could not help but hope. She did not tell the Major, but he knew, and a thousand times worse—she knew that he knew. So they came home. Life was done with its kindness to him. It held him savagely, cruelly, unwilling to let him go to the kinder death. Delirium drove the smile from his kindly eyes. Death came slowly like a torturer, but it came at last on 21 February, 1886. He loved life, but it was death in the end that set him free.

After so much suffering, you might well realize how he could appreciate Swinborne's thought thus expressed:

"I have lived long enough, having learned one thing—
That life hath an end.
Goddess and maiden and queen be near me now and befriend;
Thou art more than the day or the morrow—
The seasons that laugh or that weep—
For they give joy and sorrow,
But thou, Presephane, sleep."

And now we come to remember him. He would want us to speak frankly of him, and so we would. We say it truly: In the office in this Court he was no great man; he was faithful; he was competent; he was honest. And yet somehow his service here, efficient and valuable as it was, was not the great thing in his life. His genius was in living. His genius lay in his love of life, in his love of its fine things, its good things, its lovely things. He had a genius for joyous living, but there was something greater than that: It was that he could sacrifice and remain wholesome in spirit.

Write him down then, not primarily as a public officer with whom public office was a sacred trust, but as a man who could go smiling after sacrifice for an ideal.

On behalf of his loved ones, I now have the honor of presenting to the Court the portrait of him who for many years served this Court, that it may take its place among the silent images of his predecessors, who have gone the way of all flesh.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF FORMER CLERK WILLIAM H. BAGLEY, IN THE SUPREME COURT ROOM, 14 MAY, 1929

For seventeen years, beginning in 1869, and ending with his death in 1886, Major William H. Bagley served as Clerk of this Court. It is fitting that his portrait should adorn the walls of the office which he filled so long; and we welcome the opportunity of thus honoring his memory.

His achievements—military, public and private—have been faithfully chronicled by his friend and ours, and to this admirable and sympathetic sketch nothing can be added by way of improvement. That he was "an upright, capable and efficient officer, loyal friend and excellent citizen," was the judgment of his contemporaries and this has been handed down to us as a correct estimate of his worth.

> He who serves well his day and generation,
> Foreshadows a life of effort beyond his own.

The Marshal will hang the portrait in the hall of our records, where it will remain as a testimonial of the lasting impression which Major Bagley made upon the State and its people; and these proceedings will be published in the forthcoming volume of our Reports.

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ABATEMENT AND REVIVAL (Pleading of matters in abatement see Pleadings B f).

B Pending Actions.

a Time from which Action is Pending

1. An action is pending in the Superior Court from the time the clerk issues the summons for service by the proper process officer, and where the action has not abated by failure to complete service as the law requires, another action later begun, involving the same subject-matter between the same parties, will be dismissed when this is properly made to appear. C. S., 475. *Morrison v. Lewis*, 79.

b Same Subject of Action and Abatement of Subsequent Actions

1. The pendency of a suit involving substantially the same cause of action will prevent the plaintiff from maintaining a subsequent action upon any matters which were, or should have been, properly included within the scope of the former one, and the plaintiff may not maintain two separate actions for different damages resulting from the same negligent act, and a later action will be dismissed when this is properly made to appear. *Underwood v. Dooley*, 100.

2. Where an insurance company, under a policy covering damage to an automobile alone, has paid the insured for damages to it caused by the negligence of a third person, and has recovered judgment in its action against the *tort-feasor*, the owner may maintain a subsequent action against the *tort-feasor* to recover damages for personal injury arising from the same tort, as such action is not substantially the same as the pending action nor between the same parties. *Ibid.*

3. It is the policy of our courts and system of pleading to avoid multiplicity of suits, and where full and adequate relief may be had in a pending prior action a subsequent action on the same cause of action by the same party will be abated. *Bank v. Broadhurst*, 365.

4. Where in a creditor's bill the plaintiffs seek to set aside certain of the debtor's conveyances on the ground of fraud, and the owner of a note executed by the debtor, and secured by hypothecated bonds, joins in the creditor's bill and seeks to recover on the note and to sell the collateral, and in defense to the action on the note the debtor alleges that he was only an accommodation endorser and that usurious interest thereon was paid which he seeks to recover under the statute, and a motion is made and granted that the other makers and endorsers on the note be made parties and their respective liabilities determined: *Held*, a second action on the same note by the owner thereof, seeking the same relief, brought in a different county against all the makers and endorsers will be abated, since all the issues can be determined in the pending prior action and full and adequate relief granted therein. *Ibid.*

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1. The acceptance by a creditor of a check stating thereon to be in full for a disputed account is a satisfaction thereof when there is no ambiguity in the transaction and nothing to show that its acceptance was upon a different understanding or agreement. *Walston v. Coppersmith*, 407.

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A Nature and Requisites.

f Adverse Claim by Tenant or those Claiming under Him

1. Where the relation of landlord and tenant exists, the tenant will not be permitted to dispute the landlord's title, either by setting up an adverse claim to the property or by undertaking to show title in a third person, during the continuance of the tenancy, or without first surrendering the possession to the landlord. *Pitman v. Hunt*, 574.

2. Where a tenant on land takes possession under the title of the landlord, the possession of the tenant is deemed in law the possession of the landlord, and in order for the tenant to acquire title by adverse possession he must show possession for twenty years after the termination of the tenancy under a written lease, or, where there is no written lease, from the payment of the last rent, and if the title is claimed under color, seven years sufficient possession must be shown. *Ibid.*

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ALIENS.

A Rights and Disabilities.

a Right to Sue in Courts of this State

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A Nature and Ground of Appellate Jurisdiction of Supreme Court and Judgments and Decisions Reviewable.

c Right to Appeal upon Overruling Demurrer

1. Where a demurrer to a complaint in a civil suit on the ground of its insufficiency to state a cause of action, has been overruled, the procedure for the defendant is to except and duly appeal to the Supreme Court, and where he has appealed, but has failed to prosecute it, he may not plead and again demur before another judge of the Superior Court at a subsequent term of court, the action of the former judge in refusing the motion being conclusive. C. S., 601. *Power Co. v. Peacock*, 735.

d Finality of Judgment; Premature Appeals

1. An appeal to the Supreme Court will lie only from final judgment, and an appeal from the denial of a motion for judgment on the pleadings will be dismissed. *Shelton v. Hodges*, 221.

E Record.

a Matters which Record Should Contain and Sufficiency of Record

1. Under Rule 19, section 1, the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. *Schwarberg v. Howard*, 126.

b Matters not set out in Record Deemed without Error

1. Where there is exception on appeal to the charge of the court, the charge will be presumed to be correct where it is not set out in case on appeal. *S. v. Weston*, 25.

g Conclusiveness of Record

1. On appeal the Supreme Court is bound by the record as it is sent up. *S. v. Stansberry*, 350; *S. v. Griggs*, 352.

h Questions Presented for Review

1. Where a running train of defendant railroad company has injured the plaintiff's automobile by a collision with it at a grade crossing, and the sole controverted matter on the trial in the Superior Court related to the question of defendant's negligence in failing to stop its train in time to have avoided the injury, the railroad company may not on appeal assume the position that it is not liable upon a different theory not controverted on the trial in the lower court. *Stone v. R. R.*, 429.

F Assignment of Error (Discussion of in Briefs see Appeal and Error G b).

b Form and Requisite; Rules of Court

1. Where exceptions and assignments of error in a special municipal court are overruled upon appeal to the Superior Court, and are again relied on in an appeal to the Supreme Court, they must be sufficiently definite to enable the Supreme Court to understand what questions are sought to be presented without a voyage of

APPEAL AND ERROR F *b—Continued.*

discovery through the record, Rule 19, sec. 3, and otherwise the appeal will be dismissed on the appellee's motion. *Cecil v. Lumber Co.*, 81.

G Briefs.

b Exceptions not Discussed in Briefs Deemed Abandoned

1. Assignments of error based on exceptions to instructions which are not discussed in the brief filed in the Supreme Court are taken to be abandoned on appeal under Rule 28. *Stone v. R. R.*, 429.

2. Exceptions upon the trial and taken in the record on appeal are abandoned when they are not discussed in appellant's brief. Rule 28. *Rhodes v. Tanner*, 458; *Bryant v. Construction Co.*, 639.

J Review (In actions contesting elections see Elections I d—In criminal cases see Criminal Law L e).

a Of Injunctions, Interlocutory Orders and Judgments

1. In injunctive proceedings the Supreme Court has the power to find the facts and to review the findings of fact by the trial court. *Scott v. Gillis*, 223.

2. While the Supreme Court may review the evidence on appeal in injunction proceedings, there remains the presumption that the proceedings and judgment of the lower court are correct with the burden of proof on the appellant to show error. *Land Co. v. Cole*, 452; *Roebuck v. Carson*, 492.

3. An appeal involving the validity of an order dissolving a temporary restraining order made upon a motion to show cause will not be considered on appeal to the Supreme Court when it appears that the act sought to be restrained has already been done. *Boyd v. Brooks*, 644; *Glenn v. Culbreth*, 675.

4. Where a temporary restraining order has been granted against an assessment against property by a town for street improvements upon the grounds of insufficiency of petition, and that the assessments were confiscatory, the plaintiffs being some of those assessed who had not paid: *Held*, the refusal of the trial judge to continue the injunction to the hearing will be sustained on appeal in the absence of satisfactory evidence to support the determinative allegations of the complaint. *Marshall v. Kernersville*, 674.

b Of Discretion of Court

1. A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the Superior Court judge, and is not subject to review in the Supreme Court except upon abuse of this discretion. C. S., 470. *Grimes v. Fulton*, 84.

c Of Findings of Fact (See, also, Appeal and Error J a 2).

1. Where a judgment of nonsuit has been granted, and thereafter the trial judge has restored the cause to the docket upon the ground of excusable neglect and a meritorious defense, the appellant must aptly request the trial court to find the facts upon which the judgment is based, and when this has not been done, and they do not

APPEAL AND EROR J *c—Continued.*

appear of record, it will be presumed that they support the judgment rendered and it will be affirmed on appeal. *Rutledge v. Fitzgerald*, 163.

2. Where the record does not show a request by the defendant for a finding of fact by the trial court upon which he continues a temporary injunction to the final hearing, the presumption is that the court found the facts to be as alleged in the complaint, and his order based thereon will be affirmed. *Scott v. Gillis*, 223; *Roebuck v. Carson*, 492.

3. Where the trial court is authorized to find the issuable facts in controversy in lieu of a jury, his findings supported by sufficient legal evidence will be sustained on appeal. *Brown v. Sheets*, 268.

4. Where the statute authorizing the establishment of a county court provides that a party waives his right to a jury trial unless he demands it, the finding of the court that a jury trial had been expressly waived by the parties litigant will be controlling on appeal, the presumption being in favor of the correctness of the proceedings with the burden of showing error on the appellant. *Ibid.*

5. On appeal when there is no finding in the record in regard to facts upon which a writ of assistance is granted, and no exception to the refusal of the court to make such finding, it is presumed that the judgment authorizing the issuance of the writ is correct and that the petitioner acquired only the land described in the deed of trust, in the judgment of the court, and in the commissioner's deed, and the judgment will be upheld. *Warehouse Co. v. Willis*, 476.

6. Where an agreement was signed by one purporting to be an attorney for petitioner in proceedings under the Torrens Act, and the Superior Court has denied the motion of the petitioner to dismiss the action upon the ground of an invalid jurat apparently issued by the clerk, it will be presumed on appeal that the judge below made sufficient findings of fact to sustain his action in denying the petitioner's motion to dismiss the proceedings, and the petitioner may not sustain his averment that the attorney was not authorized by him to so act, there being no finding to support his contention. *Morgan v. R. R.*, 568.

7. Where the finding of fact and conclusions of law of the referee are supported by competent evidence and approved by the trial judge, they are presumed correct on appeal, and upon failure of the appellant to show error the judgment will be affirmed. *Buie v. R. R.*, 655.

d Burden of Showing Error on Appeal

1. While the burden is on the plaintiff in an action seeking injunctive relief to show irreparable injury entitling him to the equitable relief sought, where the equity has been granted in the Superior Court, it is upon the appealing defendant to show error in the Supreme Court. *Realty Co. v. Barnes*, 6.

2. On appeal to the Supreme Court the burden of showing error is on the appellant. *Nance v. Hulin*, 222; *Scott v. Gillis*, 223; *Brown v. Sheets*, 268; *Roebuck v. Carson*, 492; *Buie v. R. R.*, 655.

APPEAL AND ERROR J—*Continued.*

e Harmless Error and Questions Necessary to Determination of Cause

1. The appellant is not entitled to a new trial for error of law relating to an issue answered by the jury in his favor. *Lipscomb v. Cox*, 64.

2. A new trial will not be granted on appeal when the action of the trial judge excepted to can by no possibility injure the appellant. *Steel Co. v. Rose*, 464.

3. Objections to the admission in evidence of the contents of a letter alleged to have been lost upon the ground that a proper search for it had not been made is untenable when the objecting party has testified to the contents thereof on cross-examination. *Nelson v. Nelson*, 465.

4. Testimony of a witness over appellant's exception in explanation of matter elicited from him on cross-examination, with but little, if any, bearing upon the issue submitted, is not held for reversible error under the facts of this case. *In re Will of Brockwell*, 545.

5. Where questions eliciting evidence objected to are covered by admissions of the objecting party, the admission of such evidence, if erroneous, is harmless and not prejudicial. *Bridgeman v. Ins. Co.*, 599.

6. Where the physician of the plaintiff who attended him after a personal injury he had received testifies as to matters the plaintiff had told him after the injury, the admission in evidence of the testimony of the physician will not be taken as error when the matter objected to has been admitted in the pleadings and is cumulative of evidence of other witnesses not objected to. *Bryant v. Construction Co.*, 639.

7. Where the plaintiff cannot recover in his action under any aspect of the evidence, error which may have been committed upon certain phases of the case will not be regarded as reversible, and a new trial will not be granted. *Rhodes v. Upholstery Co.*, 673.

8. The refusal of the trial court to strike out a certain paragraph of the reply contradictory to one in the complaint will not be held for reversible error on appeal when the allegations thereof do not affect the result of the trial in the lower court. *Check v. Gregory*, 761.

f Of Judgments Sustaining or Overruling Demurrer

1. On appeal from the sustaining of a demurrer the only question presented is the sufficiency of the pleading, taking its allegations to be true, and matters outside of pleading will not be considered. *Glass Co. v. Hotel Corporation*, 10.

k Dismissal, Withdrawal or Abandonment

1. Where the plaintiff seeks injunction against the sale of a certain part of the lands under foreclosure of a mortgage, and appeals from the refusal of the court to continue the temporary restraining order to the final hearing, and then agrees that the foreclosure sale should not be restrained as to this part, his agreement is in effect

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APPEAL AND ERROR J *k—Continued.*

a withdrawal of his appeal in relation to such lands, and he may not successfully prosecute it further in the Supreme Court. *Boyd v. Brooks*, 644.

APT TIME see Jury C a 2.

ARBITRATION AND AWARD.

E Pleading as Defense.

a Right to Plead Award, Admissibility of Award in Evidence, and Consideration thereof by Jury

1. Where an award is set up in the defendant's answer in an action by the plaintiff to recover for materials furnished the defendant, and the award is attacked for being improperly, unlawfully and unfairly made, and the award was admitted in evidence without objection, a charge of the court to the jury that it could not consider the award is error to the defendant's prejudice, entitling him to a new trial. *Coe v. Loan Co.*, 689.

ARREST.

B On Criminal Charges.

a Amount of Force Officer May Use in Making Arrest (killing officer making arrest as murder see Homicide).

1. An officer of the law in making an arrest is required to execute his warrant by overcoming force with such sufficient force as is apparently necessary under the circumstances to comply with his duty at the time, and in so doing he is regarded in law as rightfully the aggressor. *S. v. Miller*, 445.

ASSAULT UPON A FEMALE.

D Trial.

c Instructions

1. Evidence which tends only to show that a male person over eighteen years of age met the prosecuting witness on her way to a spring near a school she was attending, and that he caught her by the arms for a moment and then released her, using no improper language, and that she was then afraid to continue her way to the spring because she did not know "who all was over there" without testimony that the defendant caused her not to go to the spring is insufficient to support an instruction that if, under the circumstances, the prosecuting witness left the place where she had a right to be, or did not go to the spring by reason of the defendant's putting her in fear, the defendant would be guilty under the provisions of C. S., 4215, is reversible error, and a new trial will be awarded. *S. v. Stansberry*, 350.

ASSISTANCE, WRIT OF.

B Issuance.

a Grounds

1. Where land has been sold by commissioners in foreclosure proceedings under a decree of court, and the sale duly confirmed, upon possession being withheld from the purchaser at the sale it is

ASSISTANCE, WRIT OF, B *a—Continued.*

proper for the court in its equitable jurisdiction to order a writ of assistance to evict the wrongful possessor and to place the purchaser in possession of the lands. *Warehouse Co. v. Willis*, 476.

c Pleadings

1. Where the respondents in their answer to a petition for a writ of assistance allege that the petitioner has caused a subdivision of the property so as to convey land not described in the deed of trust under which the petitioner seeks his relief, and the allegations in respect thereto are not denied by the petitioner: *Held*, the allegations have reference to matters of defense which do not require denial. *Warehouse Co. v. Willis*, 476.

ATTACHMENT.

C Proceedings to Secure.

b Affidavits

1. An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of the court, and where the court has found with plaintiff upon conflicting oral evidence, his findings has the effect of an amendment allowed by him. C. S., 799. *Thornburg v. Burton*, 193.

2. In attachment proceedings it is within the discretionary power of the judge of the Superior Court to allow amendments in regard to minor defects. *Pierce v. Mallard*, 679.

E Levy, Lien, Custody and Disposition of Property.

b Notice, Lien and Priority

1. C. S., 500 and 807 are to be construed *in pari materia*, and where notice of levy of attachment on defendant's land in a county has been given under the provisions of C. S., 807, by certification of the levy to the clerk of the court for that county and his notation thereof on his judgment docket and indexing in the index to judgments the effect is to take the land in *custodia legis*, and is not an action affecting the title to lands within the purview of C. S., 500, but from the day of such notice, unless the land is released, the attachment constitutes a lien superior to that of a judgment rendered in favor of another, and a later judgment in the attachment proceedings relates back to the filing and indexing of the attachment, and where such notice under C. S., 807, has been given, the filing of *lis pendens* in the same county under the provisions of C. S., 500, is unnecessary. *Pierce v. Mallard*, 679.

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AUTOMOBILES—Negligent driving of see Highways B; constituting manslaughter see Homicide C; liability of employer for employees see Master and Servant D b 2, 3; Execution against the person for wanton injury from see Execution K a 1, 2; injury from placing planks under wheels in snow see Negligence A d 1; *res ipsa loquitur* does not arise from skidding see Negligence A e 2; liability of manufacturer for warranties made by dealer see Principal and Agent A b 1, 2).

BANKRUPTCY see Building and Loan Associations D a 2.

BANKS AND BANKING (Liability of banks on checks see Bills and Notes I—worthlessness of stock as defense to action on note given therefor see Bills and Notes A a 1).

C Functions and Dealings.

c Deposits

1. The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of C. S., 230, the statute applying only where the deposit is made in the names of two persons and payable to either, nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common. *Jones v. Fullbright*, 274.

H Stockholders, Depositors and Creditors.

a Statutory Liability of Stockholders

1. Section 13, chapter 113, Public Laws 1927, is constitutional and valid, and is not in contravention of the Due Process Clause of the Federal Constitution or the Law of the Land Clause of the State Constitution, since under its provisions the statutory liability of a stockholder of an insolvent bank is not enforceable by execution under the order of the Corporation Commission until after he has been given notice and an opportunity to be heard in the course and practice of our courts, and an appeal has the effect of staying execution until his defense has been determined before a jury. *Corporation Commission v. Murphey*, 42.

2. Where a former owner of shares of stock in a bank has sold, and on the certificate, assigned his shares to a purchaser, and some time thereafter the bank has become insolvent and the liquidating agent of the bank appointed by the Corporation Commission has assessed the shares against the former owner whose name still appears as such owner on the books of the bank owing to the neglect of the transfer agent to reissue the shares to the purchaser: *Held*, the ostensible owner should be relieved of the assessment so made against him. *Darden v. Coward*, 35.

3. Entry on the books of a bank of the issuance of stock to the defendant sought to be held for his statutory liability is only prima facie evidence that the defendant is such owner, which may be rebutted by his evidence, and a verdict directed against him upon conflicting evidence is reversible error. C. S., 219(a). *Corporation Commission v. Harris*, 202.

4. In an action against an alleged stockholder in a bank to recover his statutory liability, C. S., 219(a), evidence tending to show that he had not subscribed for the stock, had received no dividends nor acted as such owner is sufficient to take the case to the jury in rebuttal of the prima facie case raised by his appearing on the books of the bank as a subscriber to its stock, and alone furnishes no evidence of ratification or estoppel. *Ibid.*

5. A subscriber to the shares of stock of a bank is not relieved of his statutory liability thereon by selling the stock unless the transfer is made on the books of the bank in accordance with the statute. 3 C. S., 219(d). *Ibid.*

BANKS AND BANKING H *a—Continued.*

6. Where the name of a person remains on the books of a bank as a stockholder on the date of the bank's insolvency, and so appears when the insolvent bank is in the hands of a liquidating agent appointed by the Corporation Commission, C. S., 219(a), Vol. 3, his statutory liability to the amount of the par value of his shares subscribed is not affected by the fact that he had prior requested the cashier of the bank to sell his shares when the cashier had not been able to do so, and the sale had not been made and the shares had not been transferred on the books of the bank to another. *In re Trust Co.*, 613.

7. The statutory liability of the holder of bank stock for the amount equal to the par value of his shares is contractual and exists from the time of the purchase of the stock, and chapter 113, Public Laws of 1927, does not alter nor enlarge this liability, but has reference only to the procedure to enforce it, and the defense that the stock was bought prior to the enactment of the statute of 1927, and that the statute could have no retroactive effect, is untenable. *Ibid.*

8. Where the holder of stock of an insolvent bank is also a depositor therein, only such dividends as he receives on his deposit may be credited by the liquidating agent of the bank upon his indebtedness to the bank on his statutory liability as a stockholder, and he is not entitled to have the total amount of his deposit applied as a payment on the assessment made against him by reason of his statutory liability. *Ibid.*

BILLS AND NOTES (Agreement in note to waive homestead see Homestead D a 1).

A Requisites and Validity.

a Consideration

1. Where in an action on a note, the evidence tends to show that the consideration for the note was certain shares of bank stock and the promise of the payee to make the payer a director of the bank, and that the payer was made a director and, acting as such director, voted for and received dividends upon his stock, the execution of the note being admitted, upon the later insolvency of the bank the payer may not maintain the position that there was a total failure of consideration, and an instruction that the jury should answer the issue of indebtedness in favor of the defendant if they found the stock to be worthless is reversible error. *Owens v. Carstarphen*, 424.

2. Where a husband and wife execute a promissory note under seal secured by a mortgage on lands, the seal affixed thereto imports that a good and sufficient consideration had been given for it, and in an action against them by the holder of the note in due course the defense of *nudum pactum* is not available to the wife. *Cowen v. Williams*, 432.

B Negotiability and Transfer.

b Transfer by Endorsement

1. Where the plaintiff has agreed to lend money to a borrower upon security of a deed of trust on lands, and has sent its check payable

BILLS AND NOTES B *b—Continued.*

to the borrower and to the attorney in order that the title to the lands be unencumbered before the money should pass to the borrower, an endorsement by the attorney for himself and as agent, for the borrower, is an improper endorsement for the borrower. *Bank v. Bank*, 526.

2. In an action to recover of the drawee bank for the payment of a check when it was not properly endorsed, and the question of whether the endorsement was proper, is the sole matter at issue under the pleadings and admissions upon the trial, the introduction of the check in evidence by the plaintiff showing payment and endorsements, is competent over the objection of the drawee bank. *Ibid.*

C Rights and Liabilities upon Endorsement or Transfer.

a Rights and Liabilities of Endorsers

1. Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions of C. S., 446, to determine the liability of the parties. *Morris v. Cleve*, 253.

2. There is no contractual relation between the drawer and endorsers of a check, and each endorser is responsible only to its immediate endorsee upon an invalid endorsement by the payee, and the drawer of the check is not entitled to a judgment against them for the amount of the loss. *Bank v. Bank*, 526.

D Construction and Operation.

a Notes in Series; Acceleration

1. Where there is no provision for acceleration in a series of notes secured by a mortgage on lands, but the mortgage itself provides that a failure to pay any of the notes or interest when due shall mature all the indebtedness thereby secured: *Held*, the provisions for acceleration appearing only in the mortgage affects only the right to foreclose the mortgage and does not affect the notes, and when action is taken before the maturity of some of the notes, as to them no recovery can be had. *Brown v. Osteen*, 305.

b As to whether Signers are Makers or Endorsers, Evidence thereof and Liability

1. An endorser of a note is one who writes his name on the back thereof, C. S., 3044, and one who writes his name, with others, on the face thereof after the written obligation to pay, is prima facie regarded as a maker, and he may not show a different liability as against the holder or payee acquiring without notice, but may show primary and secondary liability as against the other signers of the instrument by sufficient competent evidence. C. S., 2977, 3041. *Howell v. Roberson*, 572.

BILLS AND NOTES—*Continued.*

I Checks (Endorsement see Bills and Notes B, C).

a Acceptance and Liability of Drawee Bank

1. Where the evidence is conflicting as to whether a drawee bank accepted the check of a drawer bank, charged it to the account of the drawer bank, and that the charge remained on the books of the drawee bank until the next day, when the drawee bank marked the charge "error" on account of the insolvency of the drawer bank on that day, and returned the check protested, the question of the liability of the drawee bank thereon is properly submitted to the jury, and judgment upon its verdict in favor of the plaintiff will be affirmed on appeal. *Morris v. Cleve*, 253.

2. While a bank is not ordinarily liable to the payee of a check it may become liable to him upon its acceptance or certification of the check, and where the bank has paid the check otherwise than to the payees or some person authorized by them to receive payment and has charged the amount to the drawer, the bank has accepted the check and the payees may hold it liable thereon. In this case the drawer having authorized payment as if made to bearer is estopped from holding the bank liable, and had agreed to save the bank harmless in the action. *Dawson v. Bank*, 499.

3. The obligation of a bank to pay the check of a depositor from the moneys on deposit rests upon the relationship of debtor and creditor, the bank being required to make payment to the drawer's payee upon proper presentment and endorsement of the check, with the burden of proof on the drawee bank to show a proper payment when this is at issue, and in the absence of evidence thereof its motion for judgment as of nonsuit will be denied. *Ibid; Bank v. Bank*, 526.

4. Where a check is payable to two or more persons as payees, or to their order, the amount of the check must be paid to both payees or upon the order of both, and payment to one of the payees or to the order of one without the authority of the other, does not discharge the bank of its liability unless the payees are partners, and evidence of payment to one of the payees is properly excluded. C. S., 3022. *Dawson v. Bank*, 499.

5. Evidence of a local custom of paying checks of tobacco warehousemen as if made to order, is properly excluded in an action by the payees of a check, after acceptance by the bank, against the bank for paying the check to others without their authority or endorsement, title to a check being transferable only by endorsement and delivery. C. S., 3010. *Ibid.*

6. Where the drawee bank has received through the course of collection from other banks and paid a check with an improper or unauthorized endorsement which has not been subsequently ratified by the payee of the check, the relation of debtor and creditor exists between the drawer of the check and its drawee bank, and the drawee bank is liable to the drawer of the check upon the unauthorized payment. *Bank v. Bank*, 526.

BILLS AND NOTES I—*Continued.*

b Rights and Liabilities of Drawer, Payee, Bank of Deposit and Banks in Course of Collection

1. A collecting bank makes a good presentment of a check for payment by forwarding it to the drawee bank in another city by mail. 3 C. S., 220(n). *Braswell v. Bank*, 229.

2. A bank receiving from the payee a check on a bank in a different town performs its duty by sending it for collection in due course to its reputable correspondent bank at or near the place of payment. *Qualls v. Bank*, 438.

3. One depositing a check for collection in a bank is not ordinarily bound by a custom among banks that a collecting bank accepts the draft of the drawee bank on another bank in payment. *Braswell v. Bank*, 229.

4. Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of 3 C. S., 220(aa), 220(g) as being a check presented by or through a "postoffice," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. *Ibid.*

5. The payee of a check has the right to demand payment by the drawee bank in cash if the drawer has therein a deposit sufficient for payment; and where a bank receives a check in payment of a note and elects to put it in the hands of a Federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency, C. S., 3108, 3167, 3042; and this result is not affected by 3 C. S., 220(aa), providing that a drawee bank may pay a check drawn on it by its check on another bank, unless the face of the check demands payment in cash, when the check is presented for payment by any Federal reserve bank, since the payee bank has the option of presenting the check for payment through the Federal reserve bank or not. *Morris v. Cleve*, 253.

6. Where the payee of a check drawn on a bank in a different town deposits it for collection in a bank without requesting that payment by the drawee bank be demanded in cash, and in due course of collection the check is sent by the bank of deposit to its reputable correspondent bank, which in turn sends it to an intermediate bank for collection: *Held*, the check, being sent through the postoffice, is payable by the drawee bank by its draft on its reserve funds in another bank, and the bank of deposit is not liable to the payee upon the ultimate nonpayment of the check because of the insolvency and nonpayment of the draft of the drawee bank. Public Laws of 1921, ch. 4, sec. 39. *Qualls v. Bank*, 438.

7. Where a bank receives from the payee a check drawn on a bank in a different town, and sends it in due course to its reputable corres-

BILLS AND NOTES I *b—Continued.*

pondent bank, which sends it to an intermediate bank for collection: *Held*, the bank in course of collection is the agent of the payee and not the bank of deposit, and the bank of deposit is not liable to the payee for the negligence, if any, of the collecting bank. *Ibid.*

8. The failure of the bank of deposit to promptly notify the payee of the nonpayment of a check deposited by him will not subject the bank to liability in damages when no damages are shown to have resulted therefrom. *Ibid.*

9. Where banks in the course of collection of a check have successively guaranteed all prior endorsements of a check, each of such banks is responsible only to its immediate endorsee upon an invalid endorsement by the payee under the separate contracts or agreements among themselves, and the drawer of the check is not entitled to a judgment against them all for the amount of the loss. *Bank v. Bank*, 526.

c Rights and Liabilities of Parties upon Certification

1. A drawer of a check by having the drawee bank certify it before delivering it to the payee of the check does not change the status of his liability thereon, the effect being to add the credit of the bank to that of his own; but it is otherwise if the payee of the check accepts it uncertified and then has it certified by the drawee bank instead of presenting it for payment, for then the credit of the bank is substituted for that of the drawer of the check and the liability of the latter on the check he has issued ceases. C. S., 3115. *Investment Trust v. Windsor*, 208.

2. Where the evidence is conflicting as to whether the drawer of a check has it certified at the drawee bank or whether this was done by the payee thereof or his agent, a peremptory instruction that the drawer of the check was relieved from liability is reversible error, the issue being for the determination of the jury under proper instructions. *Ibid.*

BUILDING AND LOAN ASSOCIATIONS.

D Insolvency and Receivers.

a Rights and Liabilities of Borrowing Stockholders

1. Equality among the stockholders of an insolvent building and loan association requires that the solvent credits of the association be collected, thus placing the borrowing and nonborrowing stockholders on a parity; second, that the debts be paid, and third that the balance be distributed according to the respective rights of the parties, and the borrowing stockholders are not entitled to first deduct from their debt to the corporation the amounts they have respectively paid on their shares of stock from the amount they are obligated for on the mortgage debt. *Earnhardt v. Brown*, 204.

2. Where a borrowing stockholder in a building and loan association has filed his proof of claim in bankruptcy proceedings of the association in the Federal court and brings suit in the State court to enjoin the foreclosure of the mortgage securing the loan, he may not successfully maintain that the trustee in bankruptcy, appointed in pro-

BUILDING AND LOAN ASSOCIATIONS D *a—Continued.*

ceedings regular upon their face, made a party by order of the State court, was not a necessary party therein, nor are his rights prejudiced thereby. *Ibid.*

CANCELLATION OF INSTRUMENTS.

A Right thereto and Defenses.

b Cancellation for Fraud

1. Where the presumption of fraud does not apply to a deed given by a mortgagor to the mortgagee on lands not embraced in the mortgage, the mortgagor in her action to set aside the deed must allege in her complaint facts with such particularity as to show the fraud upon which the action is based, and in the absence of sufficient allegations in this respect a demurrer thereto is properly sustained. *Tull v. Harvey*, 329.

CARRIERS (Duties of railroads other than as carriers see Railroads; use of freight platform as trespass see Trespass A b 1).

B Carriage of Goods.

g Liability for Goods after Arrival at Destination

1. Where a shipment by common carrier arrives at its destination and is placed on a platform of a station owned by another carrier and used by it and the initial carrier jointly, and notice of the arrival of the shipment is duly given, the liability of the carriers is that of warehousemen; and in this case *held*, evidence of the negligence of the carriers, resulting in the destruction of the shipment by fire, was sufficient to be submitted to the jury, and the jury might place the liability upon either one or both as they found the negligence of the parties to be from the evidence, with the burden of proof on the plaintiff to show negligence by the greater weight of the evidence. *Groves Mills v. R. R.*, 388.

CAVEAT see Wills D.

CHARITABLE HOSPITALS see Hospitals B.

CHATTEL MORTGAGES see Sales I.

CHECKS see Bills and Notes I.

CIRCUMSTANTIAL EVIDENCE see Criminal Law G m.

CITIES see Municipal Corporations.

CLAIM AND DELIVERY see Replevin.

COMMUNICATIONS WITH DECEDENT see Evidence D b.

COMPROMISE AND SETTLEMENT see Accord and Satisfaction—As ratification of fraud see Fraud B c 1.

CONDITIONAL SALES see Sales I.

CONSOLIDATED STATUTES (for convenience in annotating).

Sec.

91. Deed void because not registered under the provisions of this section may be admissible as evidence of equitable title. *Sears v. Braswell*, 515.

137(5). Where niece is entitled to distribution as next of kin and survives intestate, upon her death her husband is entitled to distribution. *In re Estate of Wallace*, 334.

219(a), Vol. 3. Name on books of bank as stockholder therein is prima facie evidence of fact and takes case to the jury, but may be rebutted. *Corporation Commission v. Harris*, 202. Request by stockholder for cashier to sell his stock does not relieve stockholder of statutory liability thereon when sale has not been made. *In re Trust Co.*, 613.

219(d), Vol. 3. Stockholder of bank is not relieved from statutory liability unless transfer of stock appears on books of bank as provided for by this section. *Corporation Commission v. Harris*, 202.

220(aa), Vol. 3. Bank of deposit not liable on check when mailed for collection when there was no instruction to demand cash. *Braswell v. Bank*, 229.

220(n). Collecting bank makes good presentment of check by sending it through the mail. *Braswell v. Bank*, 229.

230. Certificate of deposit to husband payable to husband or wife does not make them tenants in common, nor operate as gift *inter vivos* to wife, and upon husband's death wife's agency to withdraw is terminated. *Jones v. Fulbright*, 274.

279. Section is of retroactive effect, and, being in derogation of common law, to be strictly construed, and does not extend to inheritance from maternal uncle. *In re Estate of Wallace*, 334.

358. Where parties have conflicting interest, admissions of administrator bank is not admissible against surety. *Commissioners of Chowan v. Bank*, 410.

441(1), 1160, 1165. Construed in *pari materia* in regard to assessing stock to pay creditors. Statute of Limitations runs from demand of directors when corporation solvent, otherwise from demand of receiver. *Redrying Co. v. Gurley*, 56.

441(9). Creditor taking mortgage not barred in action to set aside deed for fraud which had been registered for three years, under the facts of this case. *Rhodes v. Tanner*, 458.

446. Endorser of check paying it is subrogated to rights of payee. *Morris v. Cleve*, 253.

456, 507. Joinder of purchaser under conditional sales contract and his vendee is proper. *Music Store v. Boone*, 174.

470. Motion to remove cause for convenience of witnesses is discretionary with trial judge, and his action not reviewable in absence of abuse of discretion. *Goins v. Sargent*, 84.

475. Action is pending in Superior Court from issuance of summons, and subsequent action on same subject-matter will be abated. *Morrison v. Lewis*, 79.

CONSOLIDATED STATUTES—*Continued.*

SEC.

500, 807. Statutes construed in *pari materia*, and notice of *lis pendens* unnecessary in attachment. *Pierce v. Mallard*, 679.

511(6), 535. Pleadings will be liberally construed to give substantial justice. *Cole v. Wagner*, 692.

515. Superior Court may allow filing of amended pleadings within ten days after certification by Supreme Court Clerk of judgment upholding judgment sustaining demurrer. *Morris v. Cleve*, 253.

517. Plea in abatement on ground of pending action may be taken by way of answer. *Bank v. Broadhurst*, 365.

518. When and where demurrer to sufficiency to complaint may be made. *Power Co. v. Peacock*, 735.

534, 537. Defendant must ask for bill of particulars or move that plaintiff be required to amend if he desires complaint to be made more definite. *Cole v. Wagner*, 692.

635. Demurrer sustained where evidence, though conflicting, was sufficient. *Lee v. Produce Co.*, 714.

547, 549. Judge may allow amendment which does not substantially change cause of action. *Bridgeman v. Ins. Co.*, 599.

564. Failure to give alternate instructions held not reversible error. *Lipscomb v. Cox*, 64. Instructions which do not fully explain law arising from evidence reversible error. *Williams v. Coach Co.*, 12.

567. Judgment as of nonsuit rendered where plaintiff's evidence discloses contributory negligence barring recovery was proper. *Davis v. Jeffries*, 712.

568. Parties may waive right to trial by jury under provisions of statute, and in *mandamus* waiver is made by failure to move in apt time for jury trial. *Electric Co. v. Light Co.*, 766.

596. Where judgment by default and inquiry is rendered plaintiff is entitled to at least nominal damages, but inquiry should be made at subsequent term. *Foster v. Hyman*, 189.

600. In setting aside judgment meritorious defense must be found by trial judge. *Bowie v. Tucker*, 671.

601. Judgment of Superior Court unappealed from is binding on another Superior Court judge. *Power Co. v. Peacock*, 735.

626. Special judge at chambers may not hear controversy without action when he has not been appointed to hold term of court. *Green v. Stadiem*, 472.

768, 673. When execution against person in civil action is proper. Evidence held sufficient for order for execution against person of defendant after return of judgment unsatisfied in action for injury caused by reckless driving of automobile. *Foster v. Hyman*, 189.

799. Court may allow amendment of affidavit in attachment, and court's finding of fact may have effect of allowing amendment. *Thornburg v. Burton*, 193.

CONSOLIDATED STATUTES—*Continued.*

Sec.

868. Party must move in apt time for trial by jury in mandamus or right thereto is waived. *Electric Co. v. Light Co.*, 766.

869, 870, 871. It is not necessary that taxpayer be candidate to office contested in order to be relator in *quo warranto*. Jurisdiction of Superior Court not ousted by provisions in charter of municipality. *Boulding v. Davis*, 731.

987. Statute as to debt or default of another does not apply where parties have pecuniary interest in transaction. *Coxe v. Dillard*, 344.

996. Voluntary trust in personalty is revokable by donor when remainder affected by contingent interests. *Stanback v. Bank*, 292.

1097. Order of Corporation Commission that defendants submit plans for new passenger station is appealable. *Corporation Commission v. R. R.*, 699.

1139. Where agent for the making of conditional sales contract is a corporation signing of contract by it by its president is sufficient. *Pick v. Hotel Co.*, 110.

1193, 1194, 1198. Upon the expiration of the charter of a corporation the directors hold the assets in trust for creditors and stockholders. *Smith v. Dicks*, 355.

1476, 1477. Possessory action in ejectment in justices' court terminates upon questions as to title being raised. *Ogburn v. Booker*, 687.

1654. Rule 2. Advance to child defined. *Paschal v. Paschal*, 40.

1654. Rule 9. Devise to husband and wife for life remainder to their heirs takes the estate to her illegitimate child to the exclusion of his. *Battle v. Shore*, 449.

1662. Instruction that evidence was sufficient to support issues of marriage, separation and residence held not to be directed verdict or contrary to provisions of this section. *Nelson v. Nelson*, 465.

1667, Vol. 3. Allegations in complaint in action for support, board, and conspiracy to secure a deed of separation are good, and granting of alimony *pendente lite* need not be postponed until decision of action to set aside deed for fraud. *Taylor v. Taylor*, 197.

1737. Devise to granddaughter for life, and if no children to grandson, gives estate to child of granddaughter by purchase under the will. *West v. Murphy*, 488.

1795. Declarations as to transaction with decedent in regard to agreement that check was to be in full payment held inadmissible even though adverse party "opened the door" to other separate transactions with decedent. *Walston v. Coppersmith*, 407.

1795. Testimony in action in ejectment by witnesses not interested in event competent. *Pitman v. Hunt*, 574.

1798. Communications made after termination of relationship of physician and patient do not fall within provisions of this section. *S. v. Wade*, 571.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1799. Presumption of innocence of defendant in criminal action sufficient to take case to jury. Burden of proof—Questions for jury. *S. v. Allen*, 684.

1802. Conversation between husband and wife may be testified to by witness overhearing it in criminal action. *S. v. Freeman*, 376.

2306, 1743. Usurious interest does not affect the validity of a mortgage, and foreclosure will not be enjoined on that ground. *Briggs v. Bank*, 120.

2355. Sublessee liable for advancement to make crop to his lessor's landlord. *Land Co. v. Cole*, 452.

2384. Petitioners may not deny sufficiency of jurat to petition under circumstances of this case. *Morgan v. R. R.*, 568.

2433, 2469, 2470. When contract is entire itemized statement is not required. Contract attached to lien held sufficient itemization: judge to find facts from evidence. Lien relates back to time material furnished. Dates in statement presumed correct. *King v. Elliott*, 93.

2437, 2439, 2442. Where owner has had to complete building at a loss subcontractor cannot recover. *Electric Co. v. Electric Co.*, 495.

2459, 8107, 2460, 4925(a), 511(a). Sections construed together apply to warehousemen for compensation only. *Machinery Co. v. Sellers*, 30.

2572. *Mandamus* to compel another registration will not lie where there is adequate remedy by challenge to voters. *Glenn v. Culbreth*, 675.

2591. Section is to be liberally construed, and substantial compliance is sufficient. *Banking Co. v. Green*, 534. Purchaser of mortgage security before confirmation of foreclosure sale acquires lien and may enforce security. *Davis v. Ins. Co.*, 617. Clerk may revoke order for deed to be made to purchaser and order resale when prior order was premature. Last bidder acquires no rights until statute has been complied with. *Hanna v. Mortgage Co.*, 184.

2615. Violation of this section not actionable when plaintiff's evidence shows his own negligence was proximate cause of injury. *Davis v. Jeffries*, 712.

2705, 2706, 2708, 2709, 2710, 2711, 2712, 2713, 2714. Not evidence of fraud for city to agree with railroad company to pay its assessments along underpass in proceedings to compel the railroad to build underpass. *Jones v. Durham*, 127.

2707. Railroad right of way properly included in lineal feet of petition for street improvements. *Jones v. Durham*, 127.

2713, 2716. Assessments for street improvements are a lien only on lands assessed and not a personal debt payable out of assets of estate. *Carawan v. Barnett*, 511.

2714. Where statute as to appeal has not been followed, injunctive relief against levy of assessments will be denied. *Jones v. Durham*, 127.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2807, 2808. Municipal corporation may by valid statute distribute electric current for hire within radius of three miles. *Holmes v. Fayetteville*, 740.

3010. Title to check transferable only by endorsement. *Dawson v. Bank*, 499.

3022. Where there are two payees to check bank must pay to both or their order, and payment to one without authority of other does not relieve bank of liability thereon. *Dawson v. Bank*, 499.

3044, 2977. 3041. Name upon face of note is presumed as maker and different liability by parol as against holder thereof. *Howell v. Robertson*, 572.

3108, 3167, 3042. Drawer of check not liable where collecting bank failed to demand payment in cash as requested. *Morris v. Cleve*, 253.

3115. Status of maker of check unchanged by his having it certified before delivery; but when certified by payee maker is relieved of liability. *Investment Trust v. Windsor*, 208.

3171. Bank may become liable on check it certifies to payee thereof. *Dawson v. Bank*, 499.

3311. Unconditional sales contract binding as between parties thereto. *Music Store v. Boone*, 174.

3312. As between parties probate and registration not required. *Pick v. Hotel Co.*, 110.

3449. Railroad company liable in damages when it permits its tracks to be used as public crossing and fails to properly maintain such crossing. *Stone v. R. R.*, 429.

3456. State alone may sue under this section to revoke charter of railroad company. Waiver of provisions by the State. *Brummitt v. R. R.*, 381.

3846(j), (e 5), Vol. 3. Authority of State Highway Commission to abandon part of highway not subject to interference by county commissioners, and where grade crossing has been abandoned county commissioners may not reopen it. *Rockingham County v. State Highway Commission*, 116.

3930, 3932. Impose separate liability on surety for each bond of successive terms, and applies where sheriff has been put upon salary basis during life of bond, and suit against sheriff and sureties on all bonds is misjoinder. *Pender County v. King*, 50.

4103. Section not invalid. Land constituting home site: operation and effect of section. *Boyd v. Brooks*, 644.

4144(2). In this case held evidence that paper-writing purporting to be holographic will was found among valuable papers was sufficient. *In re Will of Shemwell*, 332.

4162. Devise presumed to be in fee simple. *West v. Murphy*, 488; *Brown v. Lewis*, 704.

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Sec.

4200. Killing with deadly weapon raises presumption of malice; State must show premeditation in order to convict of first degree murder. *S. v. Miller*, 445.

4215. Instruction assuming fact in issue held erroneous. *S. v. Griggs*, 362. Evidence of assault upon female held insufficient to warrant instructions in this case. *S. v. Stansberry*, 350.

4339. Physician may testify as to virtue of prosecutrix from communications between them after relationship of physician and patient had terminated. *S. v. Wade*, 571.

4447, 4448. Wilfulness is essential element of crime and is not presumed from failure to provide support. *S. v. Roberts*, 662. Abandonment held to have taken place in this State and subject to its jurisdiction. *S. v. Sneed*, 668.

4643. All evidence considered on motion to nonsuit whether offered by State or elicited from defendant. *S. v. McKinnon*, 576.

5469. Prior condemnation does not preclude county board of education from another condemnation proceedings when amount of land sought is within statutory limit. *Board of Education v. Pegram*, 33.

5784. Upon expiration of charter of corporation corporate property does not escheat. *Smith v. Dicks*, 255.

6295. Section is invalid and does not prevent foreign insurance corporations from removing cause from State to Federal Court. *Rhodes v. Insurance Co.*, 337.

6420, 3311. Mortgagee having prior registered security has superior lien on proceeds under loss payable clause of insurance policy. *Bank v. Bank*, 68.

6436, 6437. Statutory conditions are valid and binding. *Midkiff v. Ins. Co.*, 139.

CONSPIRACY (Complaint alleging conspiracy not demurrable for misjoinder see Pleadings D b 5).

A Civil Actions.

b Testimony of Codefendants or Conspirators (In criminal actions see Criminal Law G k)

1. Where a conspiracy to defraud the plaintiff is not alleged in a suit against the corporation and certain of its officers for fraudulently inducing the plaintiff to subscribe for stock in the corporation, conversations of some of the defendants in the absence of the others are erroneously admitted in evidence as to them. *Morrison v. Finance Co.*, 322.

B Criminal Conspiracy (Acts, declarations and testimony of conspirators as evidence see Criminal Law G k).

a Elements of the Crime

1. A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and does not require the accomplishing of the purpose in contemplation or any overt act in furtherance thereof. *S. v. Ritter*, 113.

CONSTITUTION (for convenience in annotating).

ART.

I, sec. 11. Rendering verdict in absence of prisoner is invalid. *S. v. O'Neal*, 548.

I, sec. 13. Agreement that judge find facts in criminal action is invalid. *S. v. Cranford*, 513.

I, sec. 14. Statutory sentence for violation of prohibition law held not cruel or unusual punishment. *S. v. Daniels*, 285.

I, sec. 17. Assessments of special drainage district are not unconstitutional as a taking of private property without compensation. *Kennelworth v. Hyder*, 85.

I, sec. 32. *Ex post facto* relates to criminal laws, and retroactive law affecting contingent interest is not objectionable. *Stanback v. Bank*, 292.

II, sec. 29. Statute relating to drainage district is not local or special legislation. *Kennelworth v. Hyder*, 85.

IV, sec. 8. Jurisdiction of Supreme Court on appeal in criminal action is confined to matters of law or legal inference. *S. v. Freeman*, 376. Supreme Court alone has power to hear appeal from judgment overruling demurrer, and where appeal, in effect, is from one Superior Court judge to another is nullity. *Power Co. v. Peacock*, 735.

IV, sec. 11. Special judge does not have power to hear controversy without action at chambers when not appointed to hold term of court. *Green v. Stadiem*, 472.

IV, sec. 13. Parties may waive trial by jury. *Electric Co. v. Light Co.*, 766.

V, sec. 3. Classification of trucks for license taxes in accordance with distance between termini is not discriminatory. *Clark v. Maxwell*, 604. Notes for purchase price of timber to be cut under usual terms of timber deeds are solvent credits subject to taxation. *Alston v. Warren County*, 470.

V, sec. 6. Bonds issued by county commissioners to refund moneys temporarily borrowed is for special purpose and do not fall within provisions of this section. *Barbour v. Wake County*, 314.

VII, sec. 2. County had authority in this case to refund bonds to take care of moneys borrowed from its general fund for road purposes. *Barbour v. Wake County*, 314.

VII, sec. 7. Bonds for highway are for necessary expense and are valid without vote of people. *Barbour v. Wake County*, 314. Taxation for drainage district is for necessary purpose and does not require submission to voters. *Kennelworth v. Hyder*, 85. Where expenses for enlargement of electric plant are to be paid out of profits the question does not fall within provisions of this section. *Holmes v. Fayetteville*, 740.

VIII, sec. 1. Applies only to private and not municipal corporations. *Holmes v. Fayetteville*, 740.

VIII, sec. 4. General Assembly may authorize city to sell electric current within three-mile zone of city limits. *Holmes v. Fayetteville*, 740.

CONSTITUTIONAL LAW (Right to trial by jury see Jury C; in criminal cases see Criminal Law I a—Right of prisoner to confront accusers see Criminal Law I b—Cruel or unusual punishments see Criminal Law K d—Constitutionality of statutes see Statutes A—Constitutional restrictions on Taxation see Taxation A).

I Due Process of Law—Law of the Land (Eminent domain see Eminent Domain—Drainage assessments not taking of property see Drainage Districts B a 3).

b What Constitutes Due Process of Law

1. The Fourteenth Amendment to the Federal Constitution does not control the power of the State to determine the process by which legal rights may be asserted or legal obligations enforced if the method of procedure gives notice and a fair opportunity to be heard. *Corporation Commission v. Murphey*, 42.

CONTRACTS (Of infants see Infants B—Money received see Money Received—*Quasi*-contracts see *Quasi*-Contracts—Insurance contracts see Insurance—With decedent for services rendered see Executors and Administrators D a—Contract to marry see Marriage Promise—Contracts of sale see Sales—For sale of timber see Deeds and Conveyances F—Option see Vendor and Purchaser—Election of remedies see Election of Remedies).

A Requisites and Validity.

f Contracts in Restraint of Trade

1. A contract not to engage in a certain business within a reasonable area for a reasonable length of time, and which does not affect the interests of the public is not void as being a contract in restraint of trade, and is valid and enforceable. *Scott v. Gillis*, 223.

2. A contract between a certified public accountant and his employee providing that the employee was not to solicit or do business as an accountant for any one of the plaintiff's customers for a period of three years after the termination of the employment, is not one in restraint of trade against public policy, and, in a suit by the employer to restrain its breach, a continuance of a restraining order against the employee to the final hearing upon proper facts being made to appear in plaintiff's favor, will be upheld on appeal. *Ibid.*

B Construction and Operation.

a General Rules of Construction

1. An interpretation that the parties to a contract have given it will be generally adopted by the court, and a contract for the purchase of furniture for a hotel subject to an itemization given therein and to such minor adjustments as may take place from time to time as the unit prices set forth, is held to cover additional items amounting to about $11,000, ordered and accepted by the vendee and shipped by the vendor under the contract. *Pick v. Hotel Co.*, 110.

D Rescission, Abandonment or Denial of Validity.

e Actions to Rescind or Attacking Validity of Contract and Defenses

1. A party may not accept the benefits of a contract and at the same time deny its validity. *Owens v. Carstarphen*, 424.

CONTRACTS—*Continued.*

E Performance or Breach.

a Breach or Performance in General

1. Where there is a contract to furnish the defendant board and lodging during his life in consideration of his willing all his property to the plaintiffs, the defendant does not breach his contract by merely leaving the plaintiff's house without objecting to the board and lodging, which the plaintiffs are ready, able, and willing to furnish, and residing elsewhere, and the plaintiffs may not maintain an action for the amount of the board and lodging to the date of his so leaving without showing that the defendant has breached the same by refusing to comply with its terms. *Harrison v. Sluder*, 76.

F Actions for Breach or to Recover Upon Contract (Measure of damages see Damages F b).

b Evidence and Burden of Proof (Instruction thereon see Contracts F c 2).

1. In an action to recover upon a contract for the division of profits from sale of timber by the defendant, the defendant to sell "to the best of his ability," the burden is on the plaintiff to show that a profit had been made or that the defendant had acted in bad faith in the sale in order to recover, and evidence as to profits made by other like manufacturers is immaterial. *Harper v. Lumber Co.*, 539.

c Instructions

1. Where, in an action on contract to recover the purchase price of a carload of peanuts sold and delivered, the defendant sets up a counterclaim for damages for the failure of the plaintiff to ship three other carloads of peanuts under an alleged contract, the plaintiff contending that he was the agent for the purchase of the three carloads and not under contract to ship them: *Held*, under the facts of this case, it was error for the trial court to refuse to give the jury instructions upon the counterclaim so pleaded and proven. *Hassell v. Peanut Corp.*, 444.

2. Where in the action by a material furnisher to enforce a statutory lien against the owner of a building the question is involved as to whether the defendant had breached her contract with her contractor, the submission of two issues to the jury, one as to the owner's breach and the other as to the contractor's breach of the same contract, under instructions placing the burden of proving one of these issues on the defendant and the other on the plaintiff, is reversible error, the effect being to put the issue as to defendant's breach upon both parties at the same time. As to the question of waiver of the defendant's breach *quære?* but not decided. *Brown v. Broadhurst*, 738.

CONTROVERSY WITHOUT ACTION.

A Submission and Proceedings.

a Judge, Jurisdiction and Venue

1. A special judge is without authority of law to hear and determine at chambers a controversy without action submitted under the pro-

CONTROVERSY WITHOUT ACTION A *a—Continued.*

visions of C. S., 626, when the Governor has not specially appointed him under the provisions of statute to hold a term of court at that time, Constitution, Art. IV, sec. 2; Public Laws 1929, ch. 137, and the proceedings of a special judge under such circumstances are a nullity, and on appeal the cause will be dismissed. *Greene v. Stadiem*, 472.

CORPORATION COMMISSION.

C Appeals from Orders of Commission.

a Parties

1. The petitioners in proceedings before the Corporation Commission for the establishment of an adequate union passenger station are not proper parties to move in the Superior Court for the dismissal of the appeal of the respondents from an order of the Commission, but where such motion is made to appear to be with the assent and concurrence of the Commission the Supreme Court may decide the appeal from the order dismissing the action in the Superior Court. *Corporation Commission v. R. R.*, 699.

c Order Appealable

1. Where the Corporation Commission in proceedings before it to compel certain railroad companies to provide an adequate union passenger depot in a city has found upon evidence regularly taken in hearings before it that the existing depot was inadequate and ordered the respondents to prepare and submit plans and specifications for a new depot, to which exceptions were duly and regularly filed and an appeal taken by the respondents, and the Commission orders the proceedings be certified and transferred to the Superior Court for trial, which has been done, all in conformity with the statute, C. S., 1097: *Held*, error for the judge presiding at the trial in the Superior Court to dismiss the appeal upon the ground that the order of the Commission was not appealable, and the proceedings remain in the Superior Court to be proceeded with upon the issues of fact raised for the determination of the jury. *Corporation Commission v. R. R.*, 699.

CORPORATIONS.

D Stock (Limitation of action on unpaid stock see Limitation of Actions B b—Statutory liability on bank stock see Banks and Banking H a—Rights of stockholders of building and loan associations upon receivership see Building and Loan Association D a).

h Actions for Fraud in Procuring Subscriptions thereto

1. Where a corporation and some of its officers are sued to cancel certain shares of stock issued to the plaintiffs for fraudulent representations alleged as an inducement to purchase them, there must be sufficient evidence that the corporation was implicated in the transaction to hold it liable thereon. *Morrison v. Finance Co.*, 322.

K Dissolution, Expiration or Forfeiture of Charter.

a Parties who may Attack Validity of, or Sue for Forfeiture

1. The State alone, acting through the Attorney-General, may institute a proceeding against a railroad company to forfeit its charter under

CORPORATIONS K *a—Continued.*

the provisions of C. S., 3456, for failure to begin construction of the railroad and complete the same within the two separate periods therein prescribed. *Brummitt v. R. R.*, 381.

b Grounds for Forfeiture and Defenses

1. Construing C. S., 3456, as to the forfeiture of the charter of a railroad company when construction of the proposed road is not commenced within three years or completed and put into operation within ten years after its charter has been granted, to make the two provisions consistent it is held that they are not alternative, and upon failure of a railroad to comply with either one of the provisions the suit of the Attorney-General will be maintained in the absence of acts or conduct upon the part of the sovereign that amount to a waiver of the default. *Brummitt v. R. R.*, 381.

2. Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by statute, C. S., 3456, and thereafter by statute the Legislature declares that certain bonds may be issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation: *Held*, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right to insist on a forfeiture. *Ibid.*

d Rights of Parties in Corporate Assets upon Dissolution or Forfeiture

1. Upon the expiration of the charter of a corporation the directors thereof hold the assets as trustees, first for the creditors, and secondarily for the stockholders in good standing at the time of the expiration of the charter, C. S., 1193, 1194, 1198, and there is no escheat as against the rights of stockholders under the provisions of C. S., 5784. *Smith v. Dicks*, 355.

2. Where an incorporated social club has continued for more than three years after the expiration of its charter to operate as though the charter had not expired, the members or stockholders in good standing at the time of the expiration of the charter are entitled in equity to a pro rata share in the assets of the corporation to the exclusion of members taken in after its expiration, with the right to sell and convey the same, where the rights of creditors are not involved. *Ibid.*

3. Where the constitution and by-laws of an incorporated social club clearly provide that its property should be owned and controlled by its resident membership to the exclusion of nonresident members such nonresident members, taken in at greatly reduced membership dues, are not entitled to share in the assets of the corporation upon the expiration of its charter. *Ibid.*

COUNTY—Taxation see Taxation—Sheriffs see Sheriffs—Liability of sureties of bonds of sheriffs and treasurers see Principal and Surety B c—Schools see Schools and School Districts.

COURTS—Supreme Court see Appeal and Error—Where appeal has not been taken from judgment overruling demurrer, demurrer cannot again be pleaded in Superior Court see Pleadings D e 3).

CRIMINAL LAW (Particular crimes see Particular Titles—Indictment see Indictment).

B Capacity to Commit and Responsibility for Crime.

a Mentality (Intoxication as affecting premeditation see Homicide B a 2)

1. Where the defense in the prosecution for a capital felony is mental disability resulting from hereditary weakness and augmented by a syphilitic infection, the burden is on the defendant to establish his defense to the satisfaction of the jury. *S. v. Wilson*, 547.

C Parties and Their Offenses (See, also, Homicide H c 1).

a Principals and Aiders and Abettors Guilty as Principals

1. One who is present when another commits a capital felony with the knowledge of the other, and does some act to render aid in the perpetration of the crime, is guilty of the offenses as an aider therein, though he takes no direct share in its actual commission, and when present advising, instigating or encouraging the other to commit the crime, is guilty as an abettor therein. *S. v. McKinnon*, 576.

D Jurisdiction.

a Determination as to Whether Crime Was Committed in this State

1. The constructive domicile of the wife is that of her husband, and where he has resided in another State and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. C. S., 4447. *S. v. Sneed*, 668.

G Evidence (Of particular crimes see Particular Titles, Homicide, Abandonment, etc.—Testimony of communication between husband and wife see Husband and Wife F c).

a Presumptions and Burden of Proof

1. Where the defense in the prosecution for a capital felony is mental disability resulting from hereditary weakness and augmented by a syphilitic infection, the burden is on the defendant to establish his defense to the satisfaction of the jury. *S. v. Wilson*, 547.

2. A defendant in a criminal action may rely upon the presumption of his innocence, which remains with him throughout the trial and introduce no evidence in his own behalf, and though this may have its moral effect on the minds of the jury, it does not of itself as a matter of law create a presumption against him, and the question of his guilt is for the determination of the jury under the evidence, with the burden upon the State to prove him guilty beyond a reasonable doubt. C. S., 1799. *S. v. Allen*, 684.

c Character Evidence

1. Where a defendant in a criminal action testifies in his own behalf the credibility of his testimony is subject to impeachment, and it is competent for the State to ask him on cross-examination whether there was then a warrant out for him from the Federal Court, when relating only to his credibility as a witness. *S. v. Dalton*, 125.

CRIMINAL LAW G *c—Continued.*

2. Where a defendant in a criminal action testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence affects only his credibility as a witness, and an instruction that such evidence might be taken as substantive evidence of guilt will be held for reversible error. *S. v. Roberson*, 657.

d Materiality and Competency in General

1. The defendant in a criminal action is not entitled to the introduction in evidence of the list of State's witnesses endorsed on the bill of indictment for the purpose of showing that all of them had not been examined by the grand jury nor called as witnesses at the trial. *S. v. Moore*, 196.

2. Testimony of a witness as to the contents of a telegram sent by the defendant while in the presence of the witness who heard the defendant narrate it to the telegraph operator and saw the operator write it down, which tended to show the defendant's anxiety as to the knowledge of another of "something on" him, is admissible with other circumstantial evidence of defendant's guilt of murder, as a circumstance tending to show guilt, the probative force being for the jury. *S. v. Fox*, 478.

i Expert Testimony

1. When the position of the deceased when killed is relevant to the inquiry it is competent for a physician who had examined the deceased and who has qualified as an expert, to testify that the killing was done with a 44 bullet while the deceased was lying down and explain the facts and circumstances upon which he based his opinion, and such testimony does not violate the rule that the issue of the defendant's guilt is exclusively for the determination of the jury. *S. v. Fox*, 478.

j Testimony of Convicts, Accomplices and Codefendants

1. Upon the trial for arson under the provisions of C. S., 4238, testimony of an accomplice that the two defendants set fire to a dwelling at night in which the prosecuting witness was sleeping is competent, but should be scutinized by the jury and not accepted as evidence unless they find beyond a reasonable doubt that it is true, and under correct instructions, it is within the province of the jury to accept it in part and reject it in part, and to convict one of the defendants and acquit the other upon conflicting evidence. *S. v. Freeman*, 376.

k Acts, Declarations and Testimony of Conspirators

1. The acts and declarations of each conspirator, while done in furtherance of the unlawful purpose or the testimony of one of them in regard to the conspiracy, is competent evidence against them all, but testimony given by one of the conspirators of his acts done in the absence of the others and in derogation of the purpose of the conspiracy is incompetent against the others, and as to them its admission constitutes reversible error. *S. v. Ritter*, 113.

CRIMINAL LAW G—*Continued.*

l Confessions

1. Where the confession of the defendant of his guilt of murder, made to an officer of the law, is excluded by the judge upon a *voire dire* on the ground that it was induced by fear or favor and therefore not voluntary, a later confession, made to another witness, is admissible when the judge finds upon sufficient evidence upon *voire dire* that it was not influenced by the causes which had induced the previous confession and that it was free and voluntary, and made without fear or favor. *S. v. Fox*, 478.

m Weight and Sufficiency

1. Where the evidence as to the possession of intoxicating liquor is capable of two inferences, one sufficient to convict and one to acquit the defendant, the case should be submitted to the jury, and on the defendant's appeal from an adverse verdict, the question of the sufficiency of the evidence to be submitted to the jury will be determined in the Supreme Court. *S. v. Weston*, 25.

2. If in a criminal action there is any evidence tending to prove the fact in issue and which raises more than a suspicion or conjecture in regard to it, the same should be submitted to the jury, otherwise not. *S. v. Allen*, 684.

p Evidence of Identity

1. Where the foot tracks of the defendant on trial for the unlawful possession of intoxicating liquor are relevant to the inquiry, the similarity between them and the shape of the defendant's identified shoes is competent to be testified to by the witnesses, being a "shorthand statement of the fact" of identification resulting from a mental conclusion made by them at the time. *S. v. Weston*, 25.

H Time of Trial and Continuance.

a Right of Defendant to Time to Prepare Defense, Employ Counsel, etc.

1. Where a trial of the defendant for violating the prohibition law is had within thirty or forty minutes from the time of his arrest, in the regular course of procedure, and the defendant does not demand time to employ and consult counsel or subpœna witnesses he waives any right thereto, and a sentence in the action will be sustained in law. *S. v. Daniels*, 285.

I Trial.

a Right to Trial by Jury

1. Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. I, sec. 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law. *S. v. Crawford*, 513.

2. Where the defendant in a criminal prosecution for a misdemeanor under the "bad check law" has entered a plea of "not guilty," he may not waive his constitutional right to a trial by jury without changing his plea. *Ibid.*

CRIMINAL LAW I—*Continued.*

b Right of Prisoner to Confront Accusers, etc., and be Present During Trial

1. The returning into court by the jury of a verdict of guilty of violating our prohibition law, while the defendant is in prison, violates the defendant's constitutional rights (Declaration of Rights, sec. 11), and in the absence of a proper waiver of this right a new trial will be ordered on appeal. *S. v. O'Neal*, 548.

e Arguments and Conduct of Counsel

1. In a criminal action the defendant is entitled to the protection of the court against the unwarranted abuse of his character by the solicitor in his argument when not supported by the evidence or by reasonable inference therefrom, and a new trial will be awarded on appeal where the trial judge refuses the appeal to him by the defendant's counsel and affords no relief from the unwarranted imputations. *S. v. Green*, 624.

2. Where in the prosecution for murder for the reckless driving of an automobile the counsel for the private prosecution in his argument to the jury appeals for a conviction because others had been killed by drunken drivers on the same highway and no one had been punished for it, and upon objection by the defense on the ground that the argument was not sustained by the evidence, the trial court remarked that he could not regulate argument of counsel unless beyond bounds, and instructed the counsel to continue: *Held*, the counsel for the prosecution went outside the record and overstepped the bounds, and the defendant is entitled to a new trial. *S. v. Phifer*, 729.

g Instructions (In prosecution of particular crimes see Assault Upon a Female D c, Homicide H and particular titles of crimes).

1. An instruction upon a vital question at issue on the trial of an assault of a male person over eighteen years of age upon a female, C. S., 4215, which assumes the fact at issue is reversible error. *S. v. Griggs*, 352.

2. Where the requests for instruction by the defendant are substantially contained in the charge, the refusal of the trial court to give the particular instructions requested will not be held for error. *S. v. McKinnon*, 576.

3. Where the judge in his charge to the jury inadvertently misstates a contention of the defendant in one particular, the inadvertence should be called to his attention before the jury retires, and under the circumstances of this case where the judge warned the jury not to be governed by his recollection, but by their own, the appellant's assignment of error in this respect cannot be sustained. *Ibid.*

j Nonsuit

1. Upon defendant's motion as of nonsuit (C. S., 4643), made after the close of the State's evidence and renewed after the close of all the evidence, all the evidence which tends to prove the defendant's guilt will be considered in the light most favorable to the State, and in this case *held:* the evidence, although circumstantial, raised more

CRIMINAL LAW I *j—Continued.*

than a conjecture, scintilla or suspicion, and was sufficient to be submitted to the jury, the probative force being for them. *S. v. McKinnon*, 576.

K Judgment and Sentence.

b Suspended Judgments

1. The refusal of the judge to hear evidence in executing judgment under a suspended sentence is a matter within his legal discretion and is not reviewable on appeal. *S. v. Vickers*, 62.

c Costs

1. Costs are no part of the punishment in a criminal action. *S. v. Cornett*, 627.

d Cruel or Unusual Punishments

1. A sentence prescribed by statute for the violation of the prohibition law is held not to be cruel or unusual within the meaning of Article I, section 14, of our Constitution. *S. v. Daniels*, 285.

L Appeal in Criminal Cases.

a Prosecution of Appeals under Rules of Court

1. An appeal from the conviction in a criminal case will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the Rules of Court, but the record will be examined for errors appearing upon its face, and where it so appears that the defendant was convicted without a trial by jury after he had entered a plea of "not guilty," the cause will be remanded to the Superior Court for trial according to law. *S. v. Straughn*, 691.

d Record

1. On appeal the Supreme Court is bound by the record as it is sent up. *S. v. Stansberry*, 250; *S. v. Griggs*, 252.

e Review

1. Where the identity of the defendant and the loss by the deceased of his pocket-book on the day of the crime have been established by the testimony of competent witnesses, incompetent testimony of another witness to these facts thus established is immaterial under the facts of this case, and the admission of the incompetent testimony is not held for reversible error. *S. v. McKinnon*, 576.

2. Where the judgment in a criminal action for a misdemeanor has been suspended until the trial of a civil action against the defendant, the cost is no part of the punishment, the effect of the imposition of cost being to vest the cost in those entitled thereto, and an appeal therefrom, not being from a final judgment or one which is final in its nature, will be dismissed. *S. v. Cornett*, 627.

g Nature and Grounds of Jurisdiction of Supreme Court on Appeal in Criminal Cases

1. The Supreme Court is ordinarily confined to matters of law or legal inference on appeal from a judgment upon a verdict of guilty in a criminal action where the evidence is conflicting upon the question of the defendant's guilt or innocence. Const., Art. IV, sec. 8. *S. v. Freeman*, 376.

CRUEL OR UNUSUAL PUNISHMENTS see Criminal Law H d.

CUSTOMS AND USAGES see Bills and Notes I b 2.

DAMAGES.

F Measure of Damages.

b Breach of Contract or Warranty

1. Where the buyer, damaged by the fraud of the seller in the sale of machinery, elects to keep the machinery and recoup the damages in the seller's action for the purchase price, the measure of damages, in the absence of proof of special loss brought home to the knowledge of the seller, is the difference between the value of the machinery as warranted and its value as delivered, and an instruction for the recovery of further damages, consisting of the cost of supplying a deficiency, is reversible error in the absence of evidence that such was done. *Frick Co. v. Shelton*, 296.

DEADLY WEAPON see Homicide G b.

DEDICATION see Trespass A c 1.

DEEDS AND CONVEYANCES (Contracts for sale of realty see Vendor and Purchaser—Fraudulent conveyances see Fraudulent Conveyances—Threatened breach of restrictions as ground of injunctive relief see Injunctions D b 1.

g Mental Capacity

1. In an action by the grantor's daughter-in-law and devisee to set aside a deed to the unrelated tenant of the grantor, evidence that tends to show that the grantor was a woman seventy-one years of age, feeble in body, easily influenced, and with the mind of a child, and that the consideration recited in the deed was ten dollars and other consideration, and the grantor refuses to testify as to the amount of the consideration paid: *Held*, sufficient to take the case to the jury under proper instructions from the court. *Gilliken v. Norcom*, 8.

C Construction and Operation.

c Estates and Interests Created

1. Under a deed of gift to the grantor's son, using the words "lend to him during his life, and after his death to this children," with *habendum* "to them and their heirs in fee simple," the word "lend" will be construed as a word of conveyance to effectuate the intent of the grantor as expressed in the instrument, and the son takes a life estate in the lands with remainder over to his children living at the time of his death, and the deed does not operate as a conveyance directly to the children living at the time the deed was made, reserving a life estate to the son, and they do not take to the exclusion of the children born thereafter. *Waller v. Brown*, 508.

d Reservations

1. A reservation in a deed in the chain of title to the *locus in quo*, contained in the description "thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the

DEEDS AND CONVEYANCES C *d—Continued.*

creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek" is held too vague and indefinite a description to admit of identification by parol evidence, and is not contrary to a covenant in a later deed against encumbrance. *Gruber v. Eubank*, 280.

f Conditions and Covenants

1. The grantee in a deed containing covenants and stipulations purporting to bind him becomes bound for their performance even though he does not execute the deed, and where a grantee of lands assumes a prior mortgage thereon he is bound thereby without signing the deed. *Coxe v. Dillard*, 344.

F Timber Deeds.

a Rights of Parties under Deed to Cut, Remove, Reënter, and Covenants in Respect Thereto

1. Under a deed conveying such right the grantee of standing timber may reënter and construct and operate a tramway on the land of the grantor for the purpose of removing timber he had acquired from owners of other lands. *Lowery v. Lumber Co.*, 299.

2. Where the purchaser of standing timber has knowledge of the right of his vendor's mortgagee to stop him from cutting timber on the *locus in quo* until a certain amount had been paid the mortgagee, and enters upon the land and cuts and manufactures timber under a provision that he pay therefor when sold, and there is evidence that he has not paid accordingly, and some time thereafter the mortgagee exercises his right to stop the cutting, and soon thereafter the vendor satisfies him and acquires the right to have the purchaser continue under his contract of sale of the timber, which the purchaser does not do: *Held*, the purchaser's action for damages for breach of contract is not upon warranty or covenant of peaceful enjoyment of the right of cutting timber, etc., and an instruction that the vendor's breach in the respect stated would prevent his recovery upon his counterclaim for the purchaser's breach is reversible error. *Poe v. Gill*, 326.

b Renewal or Forfeiture of Right to Cut Timber

1. In an action to declare a forfeiture in a timber deed for nonpayment of the sum of money stipulated to be paid on demand for renewal period, the plaintiff must show a proper demand according to the terms of the deed, and upon the failure of evidence in this respect a nonsuit is properly granted. *Sutton v. Lumber Co.*, 38.

G Torrens Deeds.

a Proceedings for Registration of Land under Torrens Act

1. Where the petitioner, to have his title to land registered under the provisions of the Torrens Act has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of C. S., 2384, upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside. *Morgan v. R. R.*, 568.

DESCENT AND DISTRIBUTION.
  B Person Entitled and Their Respective Shares.
    b Illegitimate and Legitimized Children
      1. The provisions of C. S., 279, are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment. *In re Estate of Wallace*, 334.
      2. C. S., 279, declaring legitimate a child born out of wedlock whose reputed father subsequently marries his mother is strictly construed as being in derogation of the common law. *Ibid.*
      3. The provisions of C. S., 279, legitimizing a child born out of wedlock when his reputed father subsequently marries his mother for the purpose of inheritance from its father and mother does not extend to such inheritance from his maternal uncle dying intestate after the death of his mother through whom he claims as next of kin. *Ibid.*
      4. A devise of lands by the testator to his wife for life and at her death to his and her heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his illegitimate child. C. S., 1654, Rule 9. *Battle v. Shore*, 449.
    c Heirs and Next of Kin in General and Those Claiming Under Them
      1. The estate of the intestate descends to his surviving brother and the children of his deceased brother living at his death, who are entitled to the distribution of the estate as his next of kin, C. S., 137(5), as also the husband of a deceased niece who was living at the death of the intestate, under the facts of this case. *In re Estate of Wallace*, 334.
  C Rights and Liabilities of Heirs and Distributees.
    b Advancements
      1. Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insured and some by the mother, upon the prior death of the mother her administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise. *Paschall v. Paschall*, 40.
      2. An advancement is a gift *in præsenti* by a parent to a child for the purpose of advancing the latter in life, and thus for the child to anticipate the inheritance to the extent of the advancement. *Ibid.*

DIVORCE.
  D Jurisdiction, Proceeding and Relief.
    e Trial and Instructions
      1. In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of C. S., 1662. *Nelson v. Nelson*, 465.

DIVORCE—*Continued.*

E Alimony.

a Pendente Lite

1. Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under the provisions of 3 C. S., 1667, it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the issue." *Taylor v. Taylor,* 197.

DOWER.

A Nature, Rights and Incidents.

b Lands and Interests to Which Dower Attaches (See, also, Home Site A b 2).

1. Where a wife joins in the mortgage conveyance of her husband to exclude her claim for inchoate dower therein her relation to the transaction is that of surety, and should she survive him and the land is sold to satisfy the debt she becomes a creditor of the estate in the amount equal to her dower. *Blower Co. v. MacKenzie,* 152.

B Inchoate Dower.

a Nature, Rights and Incidents

1. Inchoate dower is not an estate in land but is a subsisting, substantial right of the wife in the lands of her husband during his life, possessing some of the incidents of property, and which has a present cash value capable of computation, and becomes a right of dower upon the husband's death if she survive him. *Blower Co. v. MacKenzie,* 152.

2. Where the husband's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the wife's inchoate dower shall attach to the proceeds of the sale, the sale is not a foreclosure of the prior mortgages and the wife's right of inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable and the wife is entitled thereto as against other creditors of the husband. *Ibid.*

b Computation of Value and Inchoate Dower

1. The rule by which the present value of the wife's inchoate right of dower in her husband's lands is obtained is to ascertain the present value of an annuity for her life equal to the interest on one-third of the value of his lands to which her contingent right of dower attaches, and then deduct from the present value of the annuity for life the value of the annuity during the joint lives of herself and husband, the difference being the present value of her contingent right. *Blower Co. v. MacKenzie,* 152.

2. The value of the wife's inchoate dower in the proceeds of sale of her living husband's lands upon which there are unpaid mortgages is calculated upon the value of the entire proceeds of sale of the lands without deduction of the mortgage indebtedness assumed by the purchaser, and as the individual and joint life expectancies

DOWER B *b—Continued.*

according to the mortuary tables are dependent in part upon health and habits, the question of the present value of the inchoate right of dower must be submitted to a jury under proper instruction from the court unless otherwise agreed to by the parties interested. *Ibid.*

DRAINAGE DISTRICTS.

A Establishment and Maintenance.

a Validity and Construction of Statutes Creating Drainage District

1. Where proceedings for the establishing of a special taxing drainage district are referred to in a later statute and confirmed therein with an additional provision establishing its boundaries, the two being interrelated, are to be construed together by the courts when the constitutionality of the district is questioned. *Kenilworth v. Hyder*, 85.

b Boundaries of Drainage District

1. Where an incorporated town having a sewerage system is included in a special drainage district later established by statute giving defined boundaries overlapping those of the town, it is not required that those owning land within the lappage should be notified or give their consent to be also included within the boundaries of the special district. *Kenilworth v. Hyder*, 85.

2. The General Assembly of North Carolina has the power to create drainage districts without regard to the boundaries of the other political subdivisions of the State, such as county or municipal boundaries and the like. *Ibid.*

3. Where a statute creating a special drainage district includes in its expressed boundaries an incorporated town already having a drainage system, a proviso therein that no person, firm or corporation owning any water system shall be compelled to become a part of such sanitary district unless satisfactory, etc.: *Held*, the word "district" used in the proviso means "district system" and not the boundaries of the area, and does not operate to relieve those living in such section from the drainage assessments. *Ibid.*

B Assessments and Special Taxes.

a Constitutionality and Validity of Assessments

1. A statute which authorizes the laying off of a drainage district with power given the trustees provided therein to lay an *ad valorem* tax for its construction and maintenance is not unconstitutional for failing to provide that notice be given the owners of land situate therein that the lands will be included within the area or of the amount of the taxes to be levied or the specific purpose therefor. *Kenilworth v. Hyder*, 85.

2. A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of the State Constitution, Art. VII, sec. 7, requiring its submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by our Constitution, Art. II, sec. 29. *Ibid.*

DRAINAGE B *a—Continued.*

3. The creation by statute of a special drainage district with the power to levy an *ad valorem* tax therein for its construction and maintenance is not a taking of property within the purview of our Constitution, Art. I, sec. 17, and does not fall within the intent and meaning of the due process clause, Federal Constitution, Art. XIV, sec. 1. The distinction between taxation of this character and assessments pointed out by ADAMS, J. *Ibid.*

4. Where some of the citizens of an incorporated town having a sewerage system therein have their property also included in a special taxing drainage district defined and created by statute, the constitutionality of the later act may not be successfully questioned on the grounds either of double taxation or a taxation without benefit received. *Ibid.*

DUE PROCESS see Constitutional Law I.

EASEMENTS.

A Creation.

a By Prescription

1. Evidence that paths on a tract of land were intermittently and permissively used by tourists and others is insufficient to create an easement on the lands. *Gruber v. Eubank*, 280.

EJECTMENT.

C Pleading and Evidence.

b Evidence of Title in General

1. A paper-writing expressing that the deceased signer lets O. have certain described property at the signer's death, O. to keep all buildings in good condition, and at the death of O. "this property goes back" to the signer's estate is inoperative as a deed, as it contains no apt word of conveyance and not being under seal, or as a will or as a lease or contract specifically enforceable, and will not be received in evidence in an action in ejectment. *Walker v. Owens*, 412.

2. The recitations in a deed made by the administrator of the deceased's common source of title, that the grantee therein had paid the full purchase price, though the deed is void because of the lack of proper registration under the provisions of our statute, C. S., 91, it is competent in evidence to show an equitable title in the grantee therein. *Sears v. Braswell*, 515.

ELECTION OF REMEDIES.

a When Election May or Must Be Made

1. Where fraud is alleged in the transaction wherein a mortgage is given on lands involving the assumption thereof by a grantee of the equity of redemption, and there is evidence tending to show that the defendant by his acts and conduct with knowledge of the alleged fraud received the benefits: *Held*, he was put to his election within a reasonable time after he discovered the fraud or should have done so in the exercise of reasonable diligence, to disaffirm his contract, and where he has not done so, and has received the benefits under

ELECTION OF REMEDIES *a—Continued.*

the contract he may not successfully maintain his suit to cancel the contract, and ordinarily this is not open to him unless he is in a position to put the plaintiff in *statu quo*. *Brown v. Osteen*, 305.

ELECTIONS.

D Qualification of Voters.

c Registration

1. Failure to administer an oath to voters applying for registration does not result in a forfeiture of their right to vote, nor does their registration by third persons necessarily work a disqualification. *Glenn v. Culbreth*, 675.

2. Where it is alleged that the registration of voters in a primary municipal election was irregular and fraudulent, and the plaintiffs seek *mandamus* to compel a proper registration, and the statute under which the election is to be held provides for challenge to voters so registered: *Held*, *mandamus* being a proceeding in equity will not be issued, there being an adequate remedy at law by way of challenge provided by statute. *Ibid.*

I Action to Try Title to Office.

a Right of Action, Form of Action, Parties, Procedure and Jurisdiction

1. Where the plaintiffs, residents of a city, institute an action praying that the use of the registration for a primary election be enjoined and that *mandamus* issue for a new registration, and a temporary restraining order issued therein has been dissolved, and the election has been held, an appeal from the dissolution of the temporary restraining order, if decided in favor of the appellants, would be in effect an action to try title to office, which cannot be done by *mandamus*, the proper remedy being *quo warranto*. *Glenn v. Culbreth*, 675.

2. It is not required that a resident taxpayer and qualified voter of a municipality be a competitor of the present incumbent in an election to the municipal office in order for him to be a relator with the approval of the Attorney-Gnereal of the State in proceedings in the nature of *quo warranto*. C. S., 869, 870. *Bouldin v. Davis*, 731.

3. The jurisdiction of the courts to entertain action in the nature of *quo warranto* existed at common law and does not exclusively rest by statute, and where a municipality is authorized by certain provisions in its charter to determine the result of an election held for the election of its own officers, recount of the votes, etc., it does not oust the jurisdiction of the Superior Court to entertain original jurisdiction of the proceedings in the nature of *quo warranto* to try the disputed title to the office of one of its officials. C. S., 869. The provisions of the Federal and State Constitutions having reference respectively to the rights of Congress and the State Legislature to determine the rights of contestants to seats in the respective bodies have no application. *Ibid.*

4. In this case *held:* that a provision in the charter of a municipal corporation giving to the city commissioners the authority and right to determine the question of a contested election of one of its officers did not attempt to deprive the Superior Court of its jurisdiction, or

ELECTIONS I *a—Continued.*

make it derivative or subordinate to the action of the municipal authorities, but at most to provide a cumulative remedy. As to whether the Ligislature may by statute deprive the courts of their original jurisdiction in proceedings in the nature of *quo warranto* to determine title to office, *quære? Ibid.*

d Appeal and Review

1. Where there is no allegation or finding of fact by the trial judge that irregularities complained of in the registration of voters would have affected the result of an election, an appeal from his order dissolving a temporary order restraining the use of the registration will not be disturbed on appeal. *Glenn v. Culbreth*, 675.

ELECTRICITY (Power of municipal corporation to manufacture and sell current see Municipal Corporations B d).

A Duties and Liabilities in Respect Thereto.

a Degree of Care Required in Respect Thereto

1. A company engaged in the transmission of deadly electric currents by wires strung on poles is held to a high degree of care in the maintenance of this equipment commensurate with the danger, and its failure in this duty renders it liable in damages for injuries proximately caused thereby. *Arrington v. Pinetops*, 433.

b Trespassers, Licensees, and Attractive Nuisances

1. Where the defendants in an action for the negligent killing of plaintiff's intestate are guilty of negligence proximately causing the injury, in impairing and failing to properly maintain a power line, they may not avoid liability on the ground that plaintiff's intestate was a trespasser when the father of the plaintiff's intestate rented and cultivated a field eleven steps from the power line, and his child was killed by coming in contact with a wire permitted to remain five feet from the ground, the doctrine of attractive nuisances applying under the facts of this case. *Arrington v. Pinetops*, 433.

c Duty to Inspect and Repair Lines, etc.

1. Where an incorporated town owns and maintains its own poles and wires for the transmission of electricity from another town from which it buys its power, and there is conflicting evidence that it permitted one of its poles carrying a high voltage wire to remain for a month or more fallen so that the wire hung only five feet from the ground, the question of whether the town, in the exercise of due care, should have discovered and made the necessary repairs is for the jury, and is properly submitted to them upon the issue of its secondary liability in an action against the town and the company impairing the power line for the negligent killing of the plaintiff's intestate. *Arrington v. Pinetops*, 433.

d Acts of Third Persons and Their Liability

1. Where there is evidence tending to show that a company authorized to do so entered on the land upon which power lines were maintained, and excavated sand and gravel therefrom, and in so doing, undermined one of the poles upon which transmission wires were strung so that the pole slipped down until the wires hung about five feet from the ground at a place where it could be reasonably antici-

ELECTRICITY A *d—Continued.*

pated injury would likely result, and that the company left the wires in this dangerous condition, and that a child caught hold of one of the wires and was killed thereby: *Held*, the evidence was sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. *Arrington v. Pinetops*, 433.

B Regulation and Control of Power Companies.

a Right to Force Power Companies to Sell Current for Resale at Retail

1. Where an electric power company has not held itself out or furnished other distributing lines electricity for redistribution or resale to the latter's customers, it may not be compelled to do so by mandamus, as it has the right to restrict its services to the consumers of electricity alone when not discriminatory against distributors. *Electric Co. v. Light Co.*, 766.

EMINENT DOMAIN (Power of county board of education to exercise see Schools and School Districts B a.

B Delegation of Power.

a Agencies for Exercise of Power for Acquisition of Lands by the State

1. Under the provisions of chapter 48, Public Laws of 1927, the North Carolina Park Commission is neither a body politic nor corporate in the ordinary sense, but an agency of the State clothed with the power of eminent domain to be exercised in behalf of the State and in its name, and a demurrer to the petition of the State in condemnation of lands for the purposes of act, on the ground that the commission and not the State was the proper party, is bad. *S. v. Lumber Co.*, 4.

2. The verification of a petition, in a proceeding to condemn land for the purpose of a park authorized by chapter 48, Public Laws of 1927, to restrain cutting of timber on land sought to be condemned, is properly made by the chairman of the North Carolina Park Commission. *Ibid.*

C Compensation.

b Right to Compensation for Lands Taken and Evidence of Value

1. Where the opinion of a witness upon the value of land condemned by a town is based upon his knowledge of the value of lands situated nearby, the competency of the testimony depends upon the evidence introduced tending to show the value in the one place was sufficiently similar to that in the other, and the question is for the jury. *Ayden v. Lancaster*, 556.

2. Where a witness has testified in condemnation proceedings by a town for an addition to its cemetery with reference to the damage the owner has sustained by its taking, and on cross-examination makes inconsistent answers as to the correct basis of his opinion, his testimony is for the jury upon the credibility of the witness. *Ibid.*

3. Where on appeal from the levy of assessments for street improvements involving also the issue of compensation for land taken in condemnation proceedings, it is competent for the owner of the land, for the purpose of impeachment, to cross-examine the city's

EMINENT DOMAIN C *b—Continued.*

witness, an appraiser in the proceedings, as to the amount allowed other adjacent owners in the same proceedings when a sufficient similarity as to the comparative value of the lands taken is shown. *Greensboro v. Bishop*, 748.

c Right to Compensation for Injuries or Depreciation of Land Adjacent to Land taken and Evidence of Damage

1. Plaintiff is not entitled to nominal damages in an action against a city for the constructive taking of property by depreciating its value by its sewerage disposal plant when the city has the right of eminent domain and the jury has found that no actual damage was sustained. *Black v. Bessemer City*, 195.

2. Where a civil engineer has testified as to the area of the land petitioned by a city to be taken for an addition to its cemetery, it is but a matter of calculation as to how many cemetery lots of the usual size could be made therefrom, and testimony thereto is competent, taken with other evidence in the case, as to the damage to the value of other contiguous lands of the owner. *Ayden v. Lancaster*, 556.

3. The evidence of the depreciation in value of the owner's lands contiguous to that taken in condemnation proceedings by a town as an addition to its cemetery, it is competent for a civil engineer who has made a survey to testify from his own observations that the owner could have divided his land into lots along a certain extended street but for the condemnation. *Ibid.*

d Special Benefits

1. Where assessments for special benefits against property abutting a street sought to be improved have been levied by the commissioners and regularly confirmed by the municipal governing body in accordance with statutory provisions, the action of the commissioners is ordinarily conclusive, and the owner of the property so assessed is not entitled to have an issue submitted to a jury to fix the amount of such assessment to be charged against his property in the absence of an allegation of bad faith, or arbitrarily conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or gross injustice, or that the assessments were confiscatory, and his appeal without such allegations or evidence supporting them will be dismissed. *Greensboro v. Bishop*, 748.

e Measure and Amount of Damages

1. Where lands of the owner are taken by a town for an enlargement of its existing cemetery, compensation therefor should be awarded for the market value of the land appropriated and for the depreciation in value of other contiguous lands of the owner naturally and proximately resulting from the particular use to which the land taken is to be put, less the special benefits accruing therefrom. *Ayden v. Lancaster*, 556.

D Proceedings to Take Property.

d Judgments

1. The judgment in condemnation proceedings by a town against private lands should describe the land appropriated with certainty and

EMINENT DOMAIN D *d—Continued.*

set forth the rights of the petitioner to the land and easement, and that upon the payment of the amount assessed the title of the petitioner shall become absolute. *Ayden v. Lancaster*, 556.

ESTATES (Creation of, see Wills E b, Deeds and Conveyances C c).

A Nature and Incidents of Estates Generally.

b Equitable Estates

1. An equitable estate in lands is descendible and alienable in the same manner as legal titles. *Sears v. Braswell*, 515.

2. Under our Constitution equitable rights are not destroyed, but are administered in one court, though the distinction between actions at law and suits in equity is abolished. *Ibid.*

C Merger of Estates.

a Merger of Legal and Equitable Estates

1. Upon the payment of the purchase price of certain land according to the terms of a contract to convey it, the legal and equitable titles merge in the purchaser. *Sears v. Braswell*, 515.

ESTOPPEL.

A By Deed.

a Creation and Operation in General

1. Where the interest of a contingent remainderman under a will has been divested by the happening of the contingency, the remainderman who takes the lands by purchase under the will is not estopped by a deed of the life tenant and the contingent remainderman from setting up his title as against the grantee therein. *West v. Murphy*, 488.

B By Judgment (Judgments operating as bar to subsequent action see Judgments L b).

a Creation and Operation in General

1. Where the purchaser of lands at a judicial sale insists on confirmation and appeals from an adverse judgment, he may not thereafter maintain the inconsistent position on another appeal in the same case that the sale should not be confirmed. *Harvey v. Knitting Mills*, 177.

EVIDENCE (Of negligence see Negligence, Master and Servant C, D, Railroads D, Highways B—In criminal cases see Criminal Law G, Homicide C c, G, and Particular Crimes—In ejectment see Ejectment C—In condemnation proceedings see Eminent Domain C—In caveat proceedings see Wills D h—Competency of ancient documents see Lost or Destroyed Instruments A a 1—Of conspirators see Criminal Law G k, Conspiracy A b—Newly discovered evidence see New Trial B g—Upon nonsuit see Trial D a).

A Judicial Notice.

a Legislative Acts and Proceedings Thereunder

1. The Supreme Court will take judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of chapter 137, Public Laws 1929. *Greene v. Stadiem*, 472.

EVIDENCE—*Continued.*

C Burden of Proof see Criminal Law G a, Homicide G b, Insurance P c, Contracts F b.

D Relevancy, Materiality and Competency.

b Transactions and Communications with Decedent

1. Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication between the witness and a deceased person prohibited by C. S., 1795, and its exclusion on the trial is not error. *Pool v. Russell*, 246.

2. Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon balance on account was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by C. S., 1795. *Walston v. Coppersmith*, 407.

3. In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by C. S., 1795, such evidence must relate to the particular subject-matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy. *Ibid.*

4. Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of the statute, C. S., 1795, disqualifying a party interested in the event from testifying as a witness in his own behalf as to transactions or communications with a decedent, and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial. *Pitman v. Hunt*, 574.

c Facts in Issue and Relevant to Issues

1. Letters that do not relate to the matters in controversy are properly excluded as evidence. *Connor v. Mfg. Co.*, 66.

2. Where the plaintiff seeks to enjoin the foreclosure of a mortgage, a conversation between himself and defendant that is evidence of the indebtedness that plaintiff denies, is competent. *Ibid.*

e Privileged Communications

1. Upon the trial under an indictment for the seduction of an innocent and virtuous woman, C. S., 4339, a statement by the prosecutrix to a physician, whom she had consulted, tending to show that she was not innocent or virtuous at the time of the alleged seduction, does not fall within the principle of a privileged communication between physician and patient when made by her after this relationship has

EVIDENCE D *e—Continued.*

ceased, C. S., 1798, and its rejection as evidence by the court is reversible error to the defendant's prejudice, entitling him to a new trial. *S. v. Wade,* 571.

F Admissions.

b By Parties or Others Interested in the Event

1. Where the evidence is sufficient to sustain an action for a negligent personal injury, the defendant's acts of mercy in taking the plaintiff to a hospital after the injury and paying the bill cannot be imputed as an admission of liability for damages. *Norman v. Porter,* 223.

e Admissions in Pleadings and Introduction in Evidence

1. Under the facts of this case: *Held,* exceptions to the introduction in evidence of the pleadings as admissions of the parties are untenable under the decision of *Weston v. Typewriter Co.,* 183 N. C., 1, and other cases cited. *Morrison v. Finance Co.,* 322.

I Documentary Evidence.

b Accounts, Records, Private Writings and Letters

1. Where a finance company is sued for fraudulent representations of its financial condition in procuring a sale of its shares of stock to the plaintiff, exceptions to the introduction of some of its books relative to the inquiry and used by both parties in the examination and cross-examination of the secretary of the company as a witness will not be sustained as error. *Morrison v. Finance Co.,* 322.

2. Upon the issue of fraudulent representations inducing the plaintiff to subscribe for stock in a corporation, letters of general circularization, purporting to have been signed by the corporation's president and received by the plaintiff, having a material relation to the determination of the issue, are improperly introduced in evidence upon the trial when not further identified as issued by the company, but where the subject-matter of the letters is proved by competent evidence the error is harmless. *Ibid.*

J Parol or Extrinsic Evidence Affecting Writings see Bills and Notes D b.

K Expert Testimony (In criminal cases see Criminal Law G i).

b Subjects of Expert Testimony

1. In an action to recover damages for an alleged personal injury it is competent for the attending physician to testify as to what his patient told him of his symptoms and physical condition at the time of the physician's examination. *Bryant v. Construction Co.,* 639.

c Qualification and Competency of Experts

1. Whether a witness is competent to testify as an expert is a question primarily addressed to the sound discretion of the trial court, and his decision is ordinarily conclusive, and where an X-ray protograph of an injury bearing upon an issue involved in the action depends upon the explanation of an expert to make it understandable to the jury, the finding of the trial court that the witness was not qualified as an expert to give the explanation and excluding the photograph offered will not be disturbed on appeal. *Liles v. Pickett Mills,* 773.

EXECUTION (Right of subsequent judgment creditor to subject surplus after foreclosure to judgment see Mortgages H 1 1).

K Execution Against the Person.

a Wilful and Wanton Injuries

1. Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper. C. S., 768, 673. *Foster v. Hyman*, 189.

2. Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: *Held*, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper. C. S., 768, 673. *Ibid.*

3. An act causing injury to person or property is wilfully done when it is done purposely and deliberately in violation of law, and wantonly done when done recklessly, manifesting a reckless indifference to the rights of others, but wilfulness may be constructive, and where the wrongdoer's conduct is so reckless as to amount to a disregard for the safety of others it is equivalent to actual intent. *Ibid.*

EXECUTORS AND ADMINISTRATORS (Descent and distribution see Descent and Distribution—Estates created see Wills E).

A Appointment, Qualification and Tenure.

d Designation or Appointment of Executors

1. Where a letter written by a deceased person to his brother is proven as the holographic will of the deceased, it is not necessary that the writing specifically make use of the word "executor" if the terms employed in the letter confer the powers of executor upon the person addressed. *Dulin v. Dulin*, 215.

D Allowance and Payment of Claims.

a Liability of Estate on Expressed or Implied Contracts to Pay for Services Rendered Deceased

1. Evidence that the deceased's mother had told the witness, her son, in plaintiff's absence, that "whoever waited on her should have all that she had" is too vague and indefinite to constitute an express contract to pay her daughter for services rendered, and the daughter may not recover thereon, after her mother's death, against the administratrix. *Staley v. Lowe*, 243.

2. An adult child living with her mother as a part of the family, and rendering services to her cannot after her mother's death recover their value upon a *quantum meruit*, it being assumed that the services were rendered gratuitously in the absence of evidence to the contrary, and the mere rendition of the services is insufficient evidence of an expectation of payment on one hand and the intention to pay on the other, and the mere moving from the old family

EXECUTORS AND ADMINISTRATORS D *a—Continued.*

home to a new home without evidence of a change in the relationship is insufficient to change this result, and defendant's motion as of nonsuit is properly granted. *Ibid.*

b Other Liabilities of Estate

1. An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself, C. S., 5362. The provisions of C. S., 91, as to the order of payment of debts of the deceased has no application. *Carawan v. Barnett*, 511.

E Sales and Distribution of Estate.

a Power to Sell for Distribution

1. The power given in a will to an executor to divide the estate among the beneficiaries therein named implies the power to sell and convey both the real and personal property when necessary to effectuate the intent of the testator as gathered from the instrument. *Dulin v. Dulin*, 215.

FALSE PRETENSE.

A Elements of Crime and Grounds for Civil Liability.

b Deception and Damage

1. In order to constitute the crime of false pretense it is required that the representations alleged to be false were relied upon, and under the evidence in this case it is held the action should have been dismissed. *S. v. Poe*, 601.

d Misrepresentation of Past or Subsisting Fact

1. Where the owner of land employs agents to subdivide and sell it at public auction, and there is an existing registered deed of trust on the land of which the selling agents had knowledge, and at the sale the selling agents stated that "we guarantee a good, clear title and no encumbrance" to purchasers, the statement of the agents was not a representation that there was no encumbrance on the land, but a promissory statement that the lots would be conveyed to the purchasers with a covenant against encumbrances, and where the owner delivers to the purchasers such a deed, but fails to apply the proceeds of the sale received by him to the deed of trust, and the land is sold under foreclosure thereof, a purchaser at the auction sale may not recover against the selling agents on the representation made by them. *Shoffner v. Thompson*, 664.

FEDERAL EMPLOYERS' LIABILITY ACT see Master and Servant E.

FOOD.

A Liability of Manufacturer for Injury to Consumer.

a Deleterious and Foreign Substances

1. In his action to recover damages resulting from foreign and deleterious substances in a bottled drink the burden is on the plaintiff to show the presence of foreign or deleterious substances therein, and where the plaintiff's evidence is to the effect that he swallowed

FOOD A *a—Continued.*

something and spit, and that where he spit a fly was immediately found, but that he could not swear that the fly was ever in his mouth, with evidence of another witness that he had found a substance in a drink bottled by the defendant, but could not swear in what year he found it, the plaintiff's evidence is too vague and indefinite to establish the defendant's negligence, and his motion as of nonsuit should have been granted. *Reece v. Bottling Co.*, 661.

FOOT TRACKS see Criminal Law G p.

FRAUD (Election of remedies see Election of Remedies—Cancellation of instruments for fraud see Cancellation of Instruments A b—Fraudulent conveyances see Fraudulent Conveyances—False pretense see False Pretense—Presumption of Fraud from sale of equity by mortgagor see Mortgages F c).

B Right of Action and Defenses.

c Ratification

1. Where in an action to recover for material furnished the contractor for the erection of a building, involving the liability of the surety on the contractor's bond, the defense of fraud in the procurement of the bond was pleaded, to which the plaintiff replied alleging a compromise by the surety and owner in a certain sum, to which last pleading a demurrer was interposed on the ground that it set up a new cause of action: *Held*, the alleged compromise being for the benefit of the material furnishers who were protected by the bond, it enured to their benefit, and was a ratification of the surety's liability on the original bond, and the demurrer was bad: and, *Held further*, the interpretation of the compromise agreement was not before the Supreme Court on this appeal. *Glass Co. v. Hotel Corporation*, 10.

FRAUDS, STATUTE OF.

A Promise to Answer for Debt or Default of Another.

a Applicability and Defenses

1. Where a grantor makes deed to one of the defendants for the benefit of the others, at their request and for their convenience, and a prior mortgage debt is assumed by the grantee therein, who later makes a deed to the other defendants in which the prior mortgage was assumed by them: *Held*, in the original grantor's action on the mortgage debt to recover against the defendants for whose benefit the grantee defendant took title, the statute of frauds does not apply since each of the defendants had a pecuniary interest in the transaction. C. S., 987. *Coxe v. Dillard*, 344.

FRAUDULENT CONVEYANCES.

A Transfers and Transactions Invalid.

j Knowledge and Interest of Grantee

1. Where a father having a remainder in land after a life estate conveys by deed his interest in the land to his children, and in an action to set aside the deed for fraud against a creditor of the father the jury finds that there was no consideration for the deed, the fact that the children were not of sufficient age to have participated in the fraud is immaterial. *Rhodes v. Tanner*, 458.

GIFTS (By party to marriage promise contract see Marriage Promise B a).

A Inter Vivos.

a Requisites and Essentials

1. To constitute a gift of personal property *inter vivos* there must be actual or constructive delivery of the thing given with the present intent to pass the title to the donee. *Harrell v. Tripp*, 426.

b Construction of Transaction as a Gift Inter Vivos

1. A certificate of deposit issued by a bank in the name of the husband, payable to his or his wife's order on return of the certificate properly endorsed, creates an agency in the wife to withdraw the money which is revoked at the death of the husband, and does not operate as a gift *inter vivos*. *Jones v. Fullbright*, 274.

GUARDIAN AND WARD (Liability of ward's estate on his contract see Infants B a 4).

C Custody and Care of Ward's Person and Estate.

a Liability of Guardian and Surety for Loss to Estate in General

1. The liability of a guardian and the surety on his bond for a loss to the estate of the ward caused by the failure of a bank in which the guardian kept deposits of the estate, does not attach when it is found that the guardian exercised good faith and due diligence, and the refusal of the trial court to substantially submit this issue to the jury under the evidence in this case is reversible error. *Pierce v. Pierce*, 348.

HEALTH see Drainage Districts.

HEIRS see Descent and Distribution.

HIGHWAYS (Preventing use of public way as trespass see Trespass A c).

A State Highway Commission.

a Powers of Highway Commission in Regard to Location, Abandonment, etc., of Highways

1. The State Highway Commission is given exclusive authority by statute to eliminate and close grade crossings of railroad tracks on the highway, and when it has so closed a grade crossing and substituted an underpass in the interest of public safety, 3 C. S., 3846(j), 3846(7), the commissioners of a county are without power to order the grade crossing abandoned by the Commission reopened to the public, and this power is not given the county by C. S., 3846 (e 5), authorizing the county commissioners to reincorporate into the county systems any portion of highway abandoned by the State Highway Commission. See, also, the declaratory statute ratified 18 March, 1929. *Rockingham County v. R. R.*, 116.

B Use of Highway and Law of the Road.

c Speed on Highway

1. The operating of an automobile upon a public highway or street at a speed in excess of the limit fixed by law is negligence *per se*. *Whitaker v. Car Co.*, 83.

HIGHWAYS B *c—Continued.*

2. Negligence in exceeding the legal speed limit on a public highway or street is insufficient for a recovery of damages unless there is a causal connection between the breach of duty imposed by law and the injury complained of. *Ibid.*

g Contributory Negligence

1. Where the action for damages arising from the defendant's truck and trailer being nearly across a public road near the corporate limits of a town at night without lights, etc., in violation of C. S., 2615, and the plaintiff's own evidence shows that his collision therewith was caused by his excessive speed in driving his motorcycle through rain and partial sleet, and that otherwise he could have passed in safety: *Held*, notwithstanding the defendant's negligence, the plaintiff's own evidence disclosed contributory negligence barring his recovery, and defendant's motion as of nonsuit was properly granted. *Davis v. Jeffreys*, 712.

h Pleadings in Action for Injury Caused by Negligence on Highway

1. Allegations in the complaint liberally construed that the defendant's driver of its truck, acting within the scope of his employment and in furtherance of his master's business, stopped the truck he was driving on a dangerous place on the highway on top of a hill near a curve in the road, at night, that he turned off the rear light of the truck and turned it on again when he heard an automobile approaching, and that the plaintiff's intestate was guiding a car being towed by the car heard by the driver of the truck, and that the light on the truck was turned on too late for the intestate to see the danger and guide his car in safety behind the lead car: *Held*, the allegations of actionable negligence against the defendant are sufficient against a demurrer. *Lee v. Produce Co.*, 714.

HOME SITE.

A Nature and Extent and Rights Therein.

a Property Constituting Home Site

1. Where a mortgagor of lands at the time of the execution of the mortgage is in possession of a certain part thereof on which, with the usual outbuildings, he lives with his family as a home, such land is a "home site" within the meaning of C. S., 4103, and held in this case that a 54.75 acres of farm land is not excessive for the purpose. *Boyd v. Brooks*, 644.

b Conveyance or Mortgage of Home Site and Rights of Parties Thereunder

1. Where the wife does not join in a mortgage made by her husband on the statutory "home site" in his lands, or have her privy examination taken as required by statute, the mortgagee takes subject to the provisions of C. S., 4103, and the purchaser at the foreclosure of such mortgage sale does not acquire under his deed the right to immediate title or possession to the land. *Boyd v. Brooks*, 644.

2. C. S., 4103, limits the effect of the conveyance of a "home site" by a husband's deed or mortgage made without the privy examination of the wife, but does not make the conveyance void, and the effect of the statute is to postpone the title and the right of possession of

HOME SITE—A *b*—*Continued.*

the "home site" under such deed until the death of the husband, when it then passes to the grantee subject only to the dower right of the wife if she survives him. *Ibid.*

HOMESTEAD.

D Abandonment, Waiver of Forfeiture.

a Agreements to waive

1. A promise on the face of a note to waive the homestead exemption and to pay attorneys' fees in its collection is not enforceable in this State. *Howell v. Robertson*, 572.

HOMICIDE.

A Homicide in General.

a Elements of and Distinctions Between First and Second Degree Murder

1. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; while murder in the second degree is the unlawful killing of a human being with malice, the presence in one case of premeditation and deliberation being the distinguishing difference between these two grades of an unlawful homicide. *S. v. Miller*, 445.

B Murder.

a Murder in the First Degree

1. Where there is evidence that the prisoner had been engaged in manufacturing intoxicating liquors in violation of statute and had threatened to kill any officer who attempted to arrest him, particularly the deceased, and this threat was made known to the deceased, who was killed by the prisoner in a gun battle on the street while the deceased was attempting to arrest the prisoner under a valid warrant: *Held*, the evidence of deliberation and premeditation is sufficient to sustain a verdict of guilty of murder in the first degree. *S. v. Miller*, 445.

2. Where one with a previously fixed purpose to kill an officer if the officer attempted to arrest him, voluntarily intoxicates himself to carry out his purpose, or deliberately brings on the difficulty when the officer attempts to arrest him under a valid warrant, and kills the officer according to his previously fixed design, the law will not mitigate the offense, but pronounces his crime murder in the first degree. *Ibid.*

C Manslaughter.

a Negligence of Defendant

1. One driving an automobile on a public highway while drunk, recklessly and in disregard of statutes for the regulation of automobiles thereon, resulting in death to another, is guilty at least of manslaughter without reference to whether he intended to inflict injury or not. *S. v. Palmer*, 135.

2. Where the injury to another would not have occurred except for the criminal negligence of the defendant in violating the safety statutes regulating the operation of automobiles upon the public highway, he is not relieved of guilt by the fact that he did all that he rea-

HOMICIDE C *a—Continued.*

sonably could to avoid the injury at the time of the occurrence under the existing conditions, provided his inability to stop was due to his prior recklessness. *Ibid.*

b Negligence of Deceased

1. One may not be convicted for driving an automobile upon a public highway in violation of safety statutes when the negligence of the injured person is the sole proximate cause of the injury, but it is otherwise if the concurring negligence of both combined was the proximate cause. *S. v. Palmer*, 135.

2. Where in a prosecution for manslaughter for the negligent killing of the deceased through the reckless driving of an automobile, the defense is interposed that the deceased met her death through her own negligence in unexpectedly running in front of defendant's car under circumstances making it impossible for him to avoid striking her: *Held*, the defendant is entitled to show as a complete defense that the death was caused by the act of the deceased and not by his negligence, and an instruction that denies him this right is reversible error to his prejudice entitling him to a new trial. The doctrine of contributory negligence does not apply. *S. v. Eldridge*, 626.

c Evidence in Prosecutions for Manslaughter

1. Evidence that the defendant while driving on a public highway stopped at a filling station and came out with a bottle of whiskey, from which he took two or three drinks, and that later one of the passengers got out of the automobile because of fear of the defendant's reckless driving, is admissible as substantive evidence and also as corroborative of other evidence of his reckless driving in a prosecution for manslaughter. *S. v. Palmer*, 135.

G Evidence.

a Weight and Sufficiency

1. Circumstantial evidence of the prisoner's guilt of murder in the first degree is held under the facts of this case sufficient to be submitted to the jury. *S. v. Fox*, 478.

2. Circumstantial evidence that the deceased was killed with a stick identified as that carried by one of the defendants; that at the time of the killing the deceased had large amounts of money on his person; that neither of the defendants had money immediately before, but had money thereafter on the night of the killing, with circumstances tending to show a division of the particular money of which the deceased was robbed, and the identity of the pocketbook of the deceased as that seen soon after the killing in the possession of one of the defendants, foot tracks of two persons, one identified as having been made by the boots of one of the defendants; that one of the defendants was seen talking to the deceased just before the killing, is *held*, with other circumstantial evidence in this case, sufficient to be submitted to the jury and to sustain a verdict of guilty as to both defendants of murder in the first degree, the one as the actual perpetrator of the crime and the other as aiding and abetting therein. *S. v. McKinnon*, 576.

HOMICIDE G *a—Continued.*

3. Where the evidence of the State is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree, motive for the killing is not an essential element of the State's case without which a conviction may not be had. *S. v. Allen*, 684.

4. Where the evidence in a trial for homicide tends to show that the prisoner and the deceased were seen talking together immediately before the latter was shot, and the deceased just after being shot said some one had shot him, but that he did not know who, and that the prisoner appeared in a neighboring house soon after the shooting, commented upon the fact that a man had been shot, and was anxious about having a pistol with him which he hid in consequence, and shells of the kind used in the pistol he had had and of the same size were found at the place of the killing, is upon the facts of this case held sufficient to be submitted to the jury and sustain a verdict of guilty of murder in the second degree. *Ibid.*

b Presumptions and Burden of Proof

1. The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. *S. v. Miller*, 445.

H Trial.

c Instructions

1. Upon the trial for a homicide, where the evidence tends to show that another struck the blow resulting in death, and that the defendant struck a blow which was not mortal, and the inference is not permissible from the evidence that they acted in concert, or that the two blows were struck at the same time, an instruction that is capable of the interpretation that if the other person struck the mortal blow the defendant would be guilty, is error prejudicial to the defendant entitling him to a new trial on appeal. *S. v. Barber*, 554.

HOSPITALS (Right to recover money received by patient for hospital expenses under judgment against *tort-feasor* see Money Received A a).

B Charitable Hospitals.

b Liability to Employees

1. A charitable hospital not operated for gain, but only for benevolent purposes, is liable in damages for a negligent injury inflicted by it on an employee as distinguished from a patient therein. *Cowans v. Hospitals*, 41.

HUSBAND AND WIFE (Marriage promise see Marriage Promise—Divorce and alimony see Divorce—Dower see Dower—Home site see Home Site—Deposit payable to wife not gift see Gifts A b 1).

A Abandonment of Wife and Children.

a Elements of the Crime

1. Where the defendant is indicted under C. S., 4447, for failure to provide adequate support for his minor children, and in the prosecu-

HUSBAND AND WIFE A *a—Continued.*

tion of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there is no presumption of wilfulness from the failure to provide adequate support, C. S., 4448, and an instruction that leaves out this essential element of the crime will be held for reversible error. *S. v. Roberts*, 662.

d Judgments

1. A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms. *S. v. Vickers*, 62.

B Rights, Duties and Liabilities (wife's liability on note under seal see Bills and Notes A a 2).

c Wife's Right of Action for Injuries to Husband, Loss of Consortium, Expenses, etc.

1. A wife may recover from one who has negligently injured her husband such moneys as she has been required to pay from her separate estate by reason of his sickness or incapacity so caused, but she may not recover for nursing him, or loss of consortium, or mental anguish, or loss of support and maintenance, or for damages he or his personal representative might recover in an action against the *tort-feasor*. *McDaniel v. Trent Mills*, 342.

E Alienation.

b Right of Action, Defenses, and Burden of Proof

1. Where in an action by a wife against the step-father and brother of her husband for the alienation of her husband's affections, the evidence introduced by the wife fails to show any malice or ill-will of the defendants toward her or that the defendants did anything to alienate the affections of the husband or cause him to separate himself from her and continue to live apart from her, but tends to show that his separation was caused by a groundless delusion due to his mental condition, with further evidence that the husband lived with the defendants after the separation, is insufficient to be submitted to the jury, and a nonsuit should be granted, the law not imputing any purpose to injure the plaintiff from the fact that the defendants allowed the husband to live with them after the separation. *Townsend v. Holderby*, 550.

2. In an action by a wife against the step-father and brother of her husband for alienating her husband's affections, and causing him to continue to live apart from her, the burden is upon her to prove these matters when alleged by her and denied by the defendants. *Ibid.*

HUSBAND AND WIFE—*Continued.*

F Actions.

a Right to Bring Action Without Joinder of Husband or Wife and Necessity of Joinder in Actions Against

1. An action brought by the wife against her husband's step-father and brother for alienating his affection from her and causing his continuous separation is in tort and does not require the joinder of her husband therein, and is not a defect of parties. *Townsend v. Holderby*, 550.

c Testimony Against Each Other or of Communications Between

1. Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife within the contemplation of C. S., 1802, and may be testified to by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case. *S. v. Freeman*, 376.

ILLEGITIMATE CHILDREN—Right to distribution see Descent and Distribution B b.

INDEPENDENT DEALER—Determination of whether party is agent or independent dealer see Principal and Agent A b.

INDICTMENT.

D Amendment.

a Power to Allow Amendments

1. Where the defendant indicted for driving an automobile while intoxicated on a public highway of the State appeals from a conviction in the recorder's court, an amendment allowed by the judge in the Superior Court to make the indictment conform to the statute "or other road over which the public has a right to travel," and in accordance with the evidence: *Held*, the amendment did not effect a substantial change in the offense charged and was properly allowed by the judge in the exercise of his discretion. *S. v. Hunt*, 707.

INDUSTRIAL COMMISSION see Master and Servant B.

INFANTS.

B Contracts.

a Validity and Right to Disaffirm

1. The defense of infancy of the defendant in a civil action must be set up in the answer, or it will be considered as waived. *Cole v. Wagner*, 692.

2. The contracts of an infant are voidable and not void. *Ibid.*

3. A father who furnishes to his infant child a living under his own roof is not ordinarily liable to a stranger for furnishing his infant child such service as the parent may not reasonably consider necessary, yet where the child has met with a serious accident rendering it necessary for him to receive treatment at a hospital in order to save his life and usefulness, the hospital may recover upon a *quantum meruit*. *Ibid.*

INFANTS B *a—Continued.*

4. Where in an action by the owners of a hospital to recover against a guardian of an infant it is alleged that the infant has recovered damages in an action against another for a negligent injury and that a part of the consideration recovered in the judgment was for hospital services rendered by the plaintiff in consequence of such injury: *Held,* the moneys recovered on account of the hospital treatment, etc., are necessaries and the plaintiff is entitled to recover from the guardian the amount so paid as moneys had and received by the infant to the use of the plaintiff as upon a *quantum meruit. Ibid.*

c Recovery of Property or Consideration by Infant

1. Where in a contract for the purchase of an automobile an infant is allowed a certain sum for a truck traded in by him, upon disaffirmance of the contract by the infant during his minority and his suit, brought by his next friend, to recover the consideration paid by him, the contract is binding upon neither party thereto, and he is entitled to recover such sums as he has paid on the purchase price and the reasonable market value of the truck at the time of the trade, and if the truck is returned to him, the market value at the time of the trade should be fixed by assessing a reasonable amount for depreciation and use, if any, while in the possession of the defendant, and an instruction that fixes the value of the truck at the amount allowed therefor in the contract is reversible error. *Collins v. Norfleet-Baggs,* 659.

d Liability of Infant for Tortious Use or Destruction of Property Received Under Contract He has Disaffirmed

1. Where an infant disaffirms his contract for the purchase of personal property during his minority he is not required by law to account for its use while in his possession or for its loss if squandered or destroyed by him before avoidance of the contract, but he is accountable for its tortious use or destruction after such avoidance and before its surrender. *Collins v. Norfleet-Baggs,* 659.

INJUNCTIONS.

B Subjects of Protection and Relief.

c Contracts

1. Where it is made to appear that the plaintiff will be damaged by the breach by his former employee of a contract not to solicit or do business of certified public accountant for the customers of his employer within three years after the termination of the employment, a sufficient consideration is shown for the granting of injunctive relief, and the fact that the work was not unique does not affect the question. *Scott v. Gillis,* 223.

D Preliminary and Interlocutory Injunctions.

b Continuing, Modifying, or Dissolving

1. Where injunctive relief is sought to restrain the violation of warranties and covenants in deed restricting the location of residences on a lot sold in a development plan under a deed duly recorded, and a serious question is presented as to whether such violation would

INJUNCTIONS D *b*—*Continued.*

cause substantial and irreparable injury to the development company, the restraining order will be continued to the hearing until the matters may be determined at the trial. *Realty Co. v. Barnes*, 6.

2. Where the evidence upon the return of a preliminary restraining order raises serious questions as to the existence of facts which make for plaintiff's rights, and sufficient to establish them if found in his favor, and damages may not be ascertained in law, the preliminary order will be continued to the final hearing. *Scott v. Gillis*, 223.

3. Where upon the hearing the court finds that the defendant failed to comply with the terms of his contract for the purchase of certain lands and had abandoned the contract, and had thereafter trespassed upon the lands and cut and removed timber therefrom, and that the defendant is insolvent, a judgment continuing a temporary restraining order to final hearing will be affirmed on appeal. *Salmon v. McFarland*, 493.

INSTRUCTIONS see Trial E.

INSURANCE (Surety bonds see Principal and Surety).

E The Contract in General.

b Construction and Operation

1. The rule that a liberal construction of ambiguous language will be given in favor of the insured has no application when the words employed clearly express the terms upon which the policy has been issued. *Anderson v. Ins. Co.*, 72; *Gant v. Ins. Co.*, 122.

2. The terms and conditions of the standard form of a fire insurance policy, C. S., 6436, 6437, and the stipulations as to a valid waiver thereof are valid and binding on the parties. *Midkiff v. Ins. Co.*, 139.

H Cancellation, Surrender, Abandonment or Rescission of Policy.

a Cancellation or Rescission by Insurer

1. The provisions in the standard fire insurance policy requiring the insurer to give the insured five days previous written notice before it cancels the policy is for the protection of the insured and must be complied with by the insurer before it can make a valid cancellation. *Urey v. Ins. Co.*, 385.

I Avoidance of Policy for Misrepresentation or Fraud.

b Matters Relating to Person Insured

1. Where in an application for a policy of accident insurance the plaintiff answered no to the question as to impairment of sight, and the jury has found that he had answered truthfully under the evidence tending to show that he had at one time an injury to his eye, but that it was cured at the time of the application: *Held*, the defense that the answer was incorrect and was a false representation affecting the validity of the policy, cannot be maintained. *Bridgeman v. Ins. Co.*, 599.

INSURANCE—*Continued.*

J. Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Subsequent.

b Nonpayment of Premiums

1. A policy of fire insurance for a term of years containing a provision excluding the insurer from liability for a loss that may occur while any installment note given for the premium remains past due and unpaid, by its valid terms does not render the insurer liable when the insured has not paid the premiums, but has given notes therefor, and a fire occurs after the maturity of the unpaid notes, in the absence of a valid waiver by the insurer of the provisions of the policy in this respect. *Smith v. Ins. Co.*, 621.

d For Failure to Give Notice of Accident and Claim for Damages

1. Where a policy of automobile accident insurance contains the condition that the insured shall give immediate notice to the insurer of accidents and claims for damages, the condition is material, affording the insurer opportunity to gather the facts for its protection when fresh in the minds of witnesses, etc., and is a condition precedent to the right of recovery by the insured. *Peeler v. Casualty Co.*, 286.

2. The failure by the insured to give the insurer notice of an accident and claim for damages by the person injured required by a condition in the automobile accident policy will make the policy void without an express forfeiture clause in the policy to that effect. *Ibid.*

3. One who is injured by the insured in an automobile accident covered by the policy of accident insurance, and sues the insurer under the provisions of the policy providing therefor upon return of execution against the insured unsatisfied, the injured person is in the same position with reference to the insurer's liability as the person insured, and is bound by a provision of the policy requiring the insured to give notice of accidents and claims for damages, and where the insured has forfeited the policy by a breach of this condition, the person injured may not recover thereon. *Ibid.*

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy.

a Knowledge, Waiver, or Agreements of Agent Binding on Principal

1. Where a policy of fire insurance stipulates that it would not be binding until countersigned by its local agent, the policy is made by the local agent on behalf of the company, and knowledge of the agent of existing conditions contrary to the express provisions of the policy at the inception of the contract is imputed to the company. *Midkiff v. Ins. Co.*, 139.

3. Where the local agent of a fire insurance company, before issuing the policy on a stock of merchandise, knows that included therein are explosives that under the terms of the policy will render it void unless waived in writing attached to its face, and nevertheless the agent issues the policy upon payment of the premium, the knowledge of the local agent is imputed to the company, and the contract being completed the insurer is estopped to deny its liability for a

INSURANCE K *a—Continued.*

fire loss covered by the policy so issued. It is otherwise if such knowledge is acquired after the policy has been delivered and the contract of insurance completed. *Ibid.*

4. Knowledge of the local agent of a fire insurance company that the insured kept explosives in his stock of merchandise covered by the policy contract, will not be imputed to the principal, when such knowledge is acquired after the policy has been issued, and where a waiver has not been obtained according to specific provisions of the policy or otherwise sufficient in law, the forfeiture provision of the policy relating thereto will be enforced. *Midkiff v. Ins. Co.*, 144.

b Acts or Knowledge of Insurer or Agent Operating as Estoppel or Waiver

1. Evidence that merchandise of the class insured usually contained explosives is incompetent to show a waiver of the policy provisions making the policy void in such instances. *Midkiff v. Ins. Co.*, 144.

2. Where a policy of fire insurance provides that the insurer would not be liable for loss covered by the policy during the time notes given for premiums were past due and unpaid, evidence that other policies issued the plaintiff, containing the same provisions had been reinstated upon the payment of the premiums, without evidence of demand by the insurer for the payment of the premium on the policy sued on after the maturity of the notes, is insufficient evidence of a valid waiver by the insurer of this provision, and the burden being upon the plaintiff to show a valid waiver, a motion as of nonsuit should be granted. *Smith v. Ins. Co.*, 621.

3. Where an insured can read and understand his policy of fire insurance, and has full opportunity to do so, and the insurer does nothing to prevent him from reading the policy, the neglect of the insured to have acquainted himself with the conditions on which the policy was issued and written cannot be taken as evidence of the waiver by the insurer of the conditions imposed. *Ibid.*

N Persons Entitled to Proceeds and Liability of Company.

c Under Loss Payable Clause

1. Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has a superior lien on the proceeds to the one having the later registered security. C. S., 6420, 3311. *Bank v. Bank*, 68.

2. If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims. *Ibid.*

INSURANCE—*Continued.*

O Payment and Subrogation.

b Subrogation

1. Where a company, under a policy covering damage to an automobile alone, has paid the insured the loss resulting from the act of a *tort-feasor*, it is entitled to maintain an action against the *tort-feasor* by subrogation to the owner's rights. *Underwood v. Dooley*, 100.

P Actions on Policies.

c Burden of Proof

1. Where the defense to an action to recover upon a fire insurance policy is that the policy was canceled by the plaintiff's agent the burden is on the defendant claiming it to show that plaintiff's agent so acted with the knowledge or authority of the plaintiff under the facts and circumstances of this case. *Urey v. Ins. Co.*, 385.

R Accident and Health Insurance.

a Construction of Contract as to Risks Covered and as to Whether Injury was Accidental

1. Where a policy of accident insurance indemnifies first against injury to the insured while a pedestrian in connection with being struck down by certain classes of motor-driven vehicles, and second, against accident from a collision while riding in certain classes of motor-driven cars, the qualifying terms of each class will be applied to the risks of its particular class, and will not be construed together so as to make the risks of one class of such vehicles or cars apply to an injury covered by the other. *Anderson v. Ins. Co.*, 72.

2. A policy insuring a person against accident by collision while riding or driving in any horse-drawn vehicle or motor-driven car by interpretation clearly excludes an accident occurring while the insured was riding on a motorcycle, a car by usual significance being an automobile, affording greater security to the one riding therein than a motorcycle. *Ibid.*

3. A motorcycle is a motor vehicle designed to travel on not more than three wheels in contact with the ground as distinguished from a motor car which has four wheels, and a body within which a person rides, affording greater safety. *Ibid.*

4. When a policy of accident insurance limits the liability of the company to injuries caused the insured by being struck by a moving automobile, its plain and unambiguous meaning will not be extended in favor of the insured to cover an injury caused by being struck with a plank hurled against her by a revolving wheel of an automobile. *Gant v. Ins. Co.*, 122.

5. Where the evidence of the plaintiff in his action to recover on a policy of accident insurance discloses that several years prior to the issuance of the policy he had been shot in the foot, the shot remaining in his foot without causing special pain or trouble, and that after the issuance of the policy he had accidentally sprained his ankle, which resulted in inflammation and necessitated an operation for the removal of the shot, and finally made it necessary to

INSURANCE R *a—Continued.*

amputate the foot, and there is no evidence that the operation necessitated the amputation: *Held*, a directed verdict on the issue of whether the injury was caused by accidental means was proper, though the burden was on the plaintiff to show that his injury was within the provisions of the policy. *King v. Ins. Co.*, 566.

INTOXICATING LIQUOR (Intoxication as affecting capacity to commit crime see Criminal Law B a; as affecting premeditation see Homicide B a 2).

B Possession and Presumption from Possession.

a Constructive Possession, and Evidence Thereof

1. Possession of intoxicating liquor necessary to convict of the offense under our prohibition law may be constructive and shown by circumstantial evidence, which in this case is held sufficient to sustain the verdict of the jury for conviction. *S. v. Weston*, 25.

2. Constructive possession of intoxicating liquor is sufficient to take the case to the jury under an indictment for violating our prohibition law by receiving, possessing, transporting, selling intoxicating liquor, and having it on hand for the purpose of sale. *S. v. O'Neal*, 548.

b Actual Possession and Evidence Thereof

1. With evidence tending to show that at night the defendant on trial for violating the prohibition law for possession and transporting of intoxicating liquor, left his automobile on the highway and went into a wood and returned with a half-gallon jar of whiskey under each arm, which he broke and sought to escape arrest, testimony is competent that the officers returned the next morning and found five gallon cans "in the same spot where they went" as a competent circumstance with the other evidence. *S. v. Rhyne*, 146.

JUDGES—Power of special judge to hear controversy without action see Controversy Without Action A a 1—Where appeal is not perfected to order overruling demurrer another judge may not again pass on question see Pleading D e 2).

JUDGMENTS (In criminal cases see Criminal Law K—in prosecution for abandonment see Husband and Wife A d—in claim and delivery proceedings see Replevin F e—Appeal from refusal to enter judgment on pleadings see Appeal and Error A d 1—Execution on see Execution).

D Judgments by Default.

b By Default and Inquiry

1. A judgment by default and inquiry entitles the plaintiff to nominal damages without further proof, but the inquiry should be made at the next succeeding term, and when it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made according to law. C. S., 596. As to whether a party may waive this provision of the statute, *quære? Foster v. Hyman*, 189.

2. It is proper for the judge of the Superior Court to set aside a judgment by default and inquiry on defendant's counterclaim under the provisions of Public Laws of 1924, ch. 18, when the plaintiff, or his

JUDGMENTS D *b—Continued.*

attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made. *Lumber Co. v. Welch*, 249.

G Lien and Priority, as against attachment see Attachment E b 1.

K Attacking and Setting Aside Judgments.

b Setting Aside for Surprise and Excusable Neglect (see, also, Appeal and Error J e 1).

1. Where the judge presiding at a term of the Superior Court corrects a judgment he has inadvertently signed dismissing the action, and in the absence of the defendant, enters a judgment sustaining a demurrer to the complaint and granting the parties additional time in which to file amended pleadings, and the plaintiff files an amended complaint, a copy of which the defendant fails to receive, and the clerk grants a judgment by default and inquiry thereon, C. S., 600, the action of the trial court at a succeeding term setting aside such judgment for excusable neglect without a finding of a meritorious defense will be reversed. *Bowie v. Tucker*, 671.

L Merger and Bar of Causes of Action and Defenses (Estoppel by judgment see Estoppel B).

b Matters Adjudicated and Operation of Judgments as Bar to Subsequent Action

1. Where the mortgagee brings action to foreclose on his mortgage on the defendant's stock of goods, and thereafter the plaintiffs bring a creditors' bill to recover on their claims and to set aside the mortgage on the grounds of fraud, and the two actions are consolidated, and upon trial it is adjudged that there was no evidence of fraud in procuring the mortgage, and upon this phase of the action is nonsuited, it is further adjudged that the balance arising from the sale of the stock, after paying the mortgage, be turned over to a receiver, appointed in the action, for the benefit of the creditors: *Held*, a subsequent creditors' bill, seeking the same relief, is barred by the prior action, the plaintiffs having had their day in court, and being still in court in the other action. *Hardware Co. v. Whitten*, 251.

2. A judgment rendered as a matter of law upon pleadings which raise issues of fact determinable only by a jury, is not an estoppel between the parties and those claiming under them in a subsequent action involving the same subject-matter. *Richardson v. Satterwhite*, 609.

3. Where the trial court enters a judgment sustaining a demurrer to the complaint and therein grants the parties additional time to file amended pleadings in his plenary discretionary power, the order sustaining the demurrer, unappealed from, does not work an estoppel upon the plaintiff to proceed on the amended pleading. *Bowie v. Tucker*, 671.

4. A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, C. S., 1476, 1477, and in the Superior Court the defendant is required to set up

JUDGMENTS L *b—Continued.*

his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject-matter of the action. *Ogburn v. Booker*, 687.

JUDICIAL NOTICE see Evidence A.

JUDICIAL SALES.

B Setting Aside.

a For Irregularity, Defective Title, or Upon Equitable Grounds

1. The purchaser at a judicial sale of land under proceedings for partition may, by motion when the matters are *in fieri*, have the court to exercise its equitable discretion to set aside the deed when it appears that his title is substantially defective and that the parties may be put in *statu quo* and the action of the court in so doing when the proper findings of fact are supported by the evidence will be upheld on appeal. *Perry v. Wiggins*, 502.

C Title, Rights and Liabilities of Purchaser.

a In General

1. The doctrine of *caveat emptor* does not apply to judicial sales under orders of court in its equitable jurisdiction, and where under such order an entire tract of land is to be sold the purchaser at the sale has a right to rely upon the court to give him a good title to the whole tract, nothing appearing to put him on notice that a less estate would be offered at the sale. *Perry v. Wiggins*, 502.

JURY.

C Right to Trial by Jury (In criminal cases see Criminal Law I a).

a Preservation or Waiver of Right

1. In an action to enforce a lien for material furnished the contractor and used in the construction of the owner's building when the defendant owner excepts to the order of reference and preserves her right to trial by jury throughout, and tenders exceptions to the referee's findings with demand in apt time for a trial of the facts by jury: *Held*, error for the trial court to confirm the referee's report and deny defendant's right to a trial by jury. *Brown v. Broadhurst*, 738.

2. The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Art. IV, sec. 12, but the manner of such waiver is governed by statute, C. S., 568, and where the plaintiff in mandamus proceedings to compel a power company to furnish it electricity for redistribution to its customers at retail fails to move in apt time for the preservation of its right to trial by jury, C. S., 868, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion is not made in apt time, and the right to trial by jury is waived. *Electric Co. v. Electric Co.*, 766.

LABORERS' LIEN AND MATERIALMEN'S LIENS.

B Proceedings to Perfect and Form a Claim of Lien.

b Form and Requisites of Claim of Lien

1. Where a materialmen's lien under the provisions of C. S., 2433, is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor. *King v. Elliott*, 93.

2. Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material he has furnished the owner of the building upon which he claims his lien under the provisions of C. S., 2433, showing on several specific dates "money advanced for payroll," "furnace contract," etc., each in stated amounts, it is held a sufficient itemization of his claims as required by the statute. *Ibid.*

3. An affidavit to a lien filed under the provisions of C. S., 2433, that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract": *Held*, sufficient to show a complete contract for the furnace at the price itemized in the statement. *Ibid.*

4. Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for material and labor furnished for a building, C. S., 2433, his finding that the contract was "to do certain work and furnish certain materials for a stated amount" under the evidence in the case is interpreted to mean that the contract referred to was entire. *Ibid.*

5. Where a lien filed under the provisions of C. S., 2433, gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct. *Ibid.*

C Operation and Effect.

b Nature, Amount and Extent of Subcontractor's Lien

1. The right of a subcontractor to recover for material furnished the owner of a building is out of the funds due the original contractor by the owner at the time notice is given by the subcontractor, and under the provisions of our statutes is enforceable by suit into the contract between the owner and the original contractor, and where the original contractor has abandoned his contract and the owner has been forced to spend more money to complete the contract than was due the original contractor under its terms, the subcontractor can recover nothing in his action against the owner for material furnished, there being nothing due the original contractor. C. S., 2437, 2439, 2442. *Electric Co. v. Electric Co.*, 495.

c Priority

1. The lien for labor and material furnished to the owner of a building under the provisions of C. S., 2433, and notice filed as required by C. S., 2469, 2470, where furnished under an entire or complete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded. *King v. Elliott*, 93.

LACHES see Limitation of Actions A a 1.

LANDLORD AND TENANT (Adverse claim by tenant see Adverse Possession A f).

D Terms for Years.

b Assignment and Subletting

1. A condition in the lease of a store that the lessee should not sell or assign the lease without the consent of the lessor is not violated by the lessee's subletting for a shorter period than the unexpired term specified in the original lease without the lessor's consent, the words "sell or assign" not excluding a sublease, the status between the lessor and the original lessee remaining unchanged by the sublease made by the latter. *Millinery Co. Little-Long Co.*, 168.

H Rent and Advancements.

a Liens Therefor

1. Where a tenant leases the premises to another who raises a crop thereon, the crops so raised by the subtenant are subject to a lien for advances made to him by his immediate lessor and also to the original lessor or owner of the land, and the latter being a landlord's lien is superior to the lien of the lessor tenant, and the crop is subject to seizure for the payment of rent due to the owner of the land. *Land Co. v. Cole*, 452.

LAW OF THE LAND see Constitutional Law I.

LEASES see Landlord and Tenant D.

LICENSE—Abuse of as trespass see Trespass A b.

LIENS—Of landlord see Landlord and Tenant H a—of laborers and materialmen see Laborers and Materialmen's Liens—of warehousemen see Warehouseman A a—lien and priority of judgments, mortgages, attachments see Particular Heads.

LIMITATION OF ACTIONS.

A Statutes of Limitation.

a Nature, Operation, and Construction in General

1. Where the purchase price in a contract to convey lands has been paid in accordance with its provisions, the purchaser has the equitable title which merges with the legal title, and the vendor and those claiming under him are merely naked trustees, and when the purchaser has been in continued peaceful possession from that time neither the statute of limitations nor laches will bar his right to have the claim of the devisees of the vendor removed as a cloud upon his title. *Sears v. Braswell*, 515.

B Computation of Period of Limitation.

b Demand

1. The application of the three-year statute of limitations, C. S., 441(1), will be construed in regard to the unpaid balance due a corporation by a subscriber to its capital stock in *pari materia* with C. S., 1165, authorizing a call on them for assessments by the directors of the corporation from time to time, and C. S., 1160, creating an

LIMITATION OF ACTIONS B *b—Continued.*

obligation on each stockholder, enforceable by the receiver, for the amount due on his subscription necessary to satisfy the creditors of the corporation. *Redrying Co. v. Gurley*, 56.

2. While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. C. S., 441(1), 1160, 1165. *Ibid.*

f Ignorance of Cause of Action or Mistake

1. The mere fact that a deed sought to be set aside by a creditor for fraud had been registered more than three years next preceding the time of action commenced is not alone sufficient to bar an action by a creditor to set it aside for fraud when the debtor remained in continuous possession as owner and at the time of mortgaging the land to the creditor to secure a note given for the debt the debtor falsely represented that there were no encumbrances on his title, under such circumstances it not being required that the creditor receiving the mortgage search the record in the office of the register of deeds, there being nothing to put an ordinarily prudent man upon inquiry, and the question of imputed notice under the circumstances is for the jury. C. S., 441, sec. 9. *Rhodes v. Tanner*, 458.

LIS PENDENS—Not necessary in attachment see Attachment E b 1.

LOGGS AND LOGGING see Deeds and Conveyances F.

LOST OR DESTROYED INSTRUMENTS.

A Proceedings to Establish, Restore or Recover on Lost Instruments.

a Evidence and Proof of Instrument

1. Where in an action to recover lands the plaintiffs introduce certain ancient deeds in order to show a common source of title, and it is claimed by the defendants that the deceased's common source of title made a contract to convey the lands to the one under whom they claim upon the payment by him of certain notes for the purchase price, and that this contract had been lost and could not be found after due diligence, and the defendants introduced an inventory of the administrator of the deceased and relies upon such inventory and the recitations in the deeds introduced by the plaintiffs: *Held*, the deeds and inventory so introduced, made *ante litem motam* and against the interest of the original owner, which tend to establish the contract to convey under which the defendants claim, are competent evidence of the execution of such contract and the payment of the consideration thereunder under the ancient document rule, and the plaintiffs are not entitled to have such evidence restricted to the purpose of showing a common source of title. *Sears v. Braswell*, 515.

MANDAMUS—To compel new registration see Elections D c 2, I a 1—To compel sale of current see Electricity B a—Right to jury trial in mandamus proceedings see Jury C a 2.

MARRIAGE PROMISE.

B Operation and Effect.

a Gifts to Third Persons by Parties to Contract

1. Where the parties have been bound by a contract to marry, neither can give away his or her property without the consent of the other, and notice before the marriage does not hinder the party injured from insisting on the invalidity of the gift before marriage. *Taylor v. Taylor*, 197.

MASTER AND SERVANT.

B North Carolina Industrial Commission.

a Creation, Existence, and Nature of Commission

1. The North Carolina Industrial Commission created by the statute is an agency of the State and subject to the fixed policy of the State requiring each department of the State government to operate within the appropriations allowed to it by the Budget Bureau under the statute creating it. *Industrial Commission v. O'Berry*, 595.

2. The moneys received under section 73 (j) of the Workmen's Compensation Act is a special fund available to the Industrial Commission for its maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed in *pari materia*, and *Held*, the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said section 73 (j) as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and amount necessary to the Industrial Commission for this purpose. *Ibid.*

C Master's Liability for Injuries to Servant.

a Nature and Extent of Liability in General

1. Where the *alter ego* of a principal orders an employee whose regular duty is to haul dirt for the construction of a highway, to take a box of dynamite caps to a tool-house, and fails to warn the servant of the danger in connection therewith, and the employee takes the box of caps to the tool-house in his pocket and deposits the box there, about a half hour being required therefor, and on the next day the employee is injured by an explosion supposed to have been caused from dynamite caps remaining in his pocket: *Held*, the master is not liable in damages for the failure to warn the servant, the injury having occurred after the particular employment had terminated. *Watson v. Construction Co.*, 586.

2. Where an employee at a cotton mill chooses of his own volition to run his hand into a revolving screen to clean it of a piece of cotton, knowing that it would be injured, except for his quickness in withdrawing it, and that the machinery should have been first stopped: *Held*, there is no presumption of negligence on the part of the defendant from the fact of injury, and the plaintiff must establish negligence of the defendant as the proximate cause of his injury, and in this case the action was properly dismissed. *Sasser v. Holt Mills*, 603.

MASTER AND SERVANT C—*Continued.*

b Tools, Machinery and Appliances, and Safe Place to Work

1. An employer of labor who assumes to transport his employees to and from work is held in the exercise of ordinary care to do so with reasonable safety, and is liable in damages to one of them injured by the negligent acts of an agent or authorized representative he has selected for that purpose when such injury is thereby proximately caused, irrespective of whether the agency thus selected and acting is an independent or subcontractor, or has contracted to do so for compensation or otherwise. *Mehaffey v. Construction Co.*, 22.

2. Where the plaintiff demands judgment for the defendant's failure to have properly heated a small office in which he was sometimes required to work at night, and the plaintiff had furnished an oil stove and oil to heat the office, and the defendant continued his employment without complaint to or knowledge of the employer of the insufficiency, the evidence is insufficient to sustain a verdict adverse to the defendant upon the issues of negligence, contributory negligence and assumption of risks, and defendant's motion as of nonsuit should have been allowed. *Hemphill v. Oil Co.*, 339.

3. In this case held, evidence of the master's negligence in failing, in the exercise of reasonable care, to provide the servant a reasonably safe place to work and reasonably safe and suitable tools and appliances was properly submitted to the jury, and defendant's motion for judgment as in case of nonsuit was properly overruled. *Langford v. Lumber Co.*, 396.

4. Where it is shown that the servant in using an electrically driven saw furnished him by the master and under the master's control, has been injured in its use by an electrical shock which would not ordinarily occur under the circumstances, a presumption of the master's negligence in furnishing an improper appliance will arise, which does not affect the burden of proof in the servant's action, but which is sufficient to sustain an affirmative answer to the issue of negligence unless the defendant has satisfied the jury otherwise under the evidence. *Bryant v. Construction Co.*, 639.

c Methods of Work, Rules and Orders

1. Upon evidence tending to show only that the defendant's driver of its truck was sent to defendant's filling station to load a heavy pump on the truck, and that usually there was sufficient help, but that on this occasion, without the knowledge of the employer, there was no help, and without using the available method of communicating the fact by telephone to the employer, the plaintiff assumed to load the pump without help: *Held*, the evidence is insufficient upon which the plaintiff could recover damages for the consequent injury upon the ground that the defendant had failed in its duty to supply sufficient help, and defendant's motion for judgment as of nonsuit should have been allowed. *Hemphill v. Oil Co.*, 339.

f Assumption of Risk

1. The burden of proof is on the defendant on the issues of assumption of risk by the plaintiff's' intestate in plaintiff's action to recover damages for a negligent killing. *Candler v. R. R.*, 399.

MASTER AND SERVANT C *f—Continued.*

2. Where there is evidence tending to show that the defendant railroad company had a rule for the safety of its employees, and there is conflicting evidence as to whether the plaintiff's intestate knew of the customary abrogation of the rule by defendant's employees, the question of assumption of risk is properly for the jury. *Ibid.*

g Contributory Negligence of Servant

1. A servant's action against the master for damages for negligently injuring him while engaged in blasting rock in a quarry is barred by an adverse verdict on the issue of contributory negligence, but the burden of proving contributory negligence is on the master. *Lipscomb v. Cox*, 64.

2. The burden of proof is on the defendant on the issue of contributory negligence in plaintiff's action to recover damages for a negligent killing. *Candler v. R. R.*, 399.

D Master's Liability for Injury to Third Persons (Acts of mercy to injured not admission of liability see Evidence F b 1).

b Scope of Employment and Furtherance of Master's Business

1. Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's young son threw in defendant's store on Saturday when the son was helping his father therein, is insufficient to hold his father liable in damages, and defendant's motion as of nonsuit is properly granted. C. S., 567. *Norman v. Porter*, 222.

2. One injured while riding on the running board of a truck as an invitee of the driver, an employee of a transportation company, may not hold the transportation company liable under the doctrine of *respondeat superior* for an injury resulting from the negligence of the driver in the absence of allegations and evidence that the driver was acting within the scope of his employment in giving the invitation, or had authority expressed or implied to invite or permit persons to ride on the defendant's truck, or that the employer had knowledge or acquiesced in his so doing on former occasions, and where the evidence fails to disclose such authority a judgment as of nonsuit is proper. *Cotton v. Transportation Co.*, 709.

3. In order to hold a master responsible for the negligence of the servant in causing an injury to a third person, it is essential that the latter should be acting in the scope of his employment and in the furtherance of the master's business, and in an action against an auto-bus line for damages resulting from the negligence of its driver in running over and killing plaintiff's intestate, a motion as of nonsuit should be entered if the plaintiff's own evidence tends only to show that a bus of the defendant was at the time of the injury being driven by an employee of the garage in which the defendant stored its buses who was returning the bus to the garage after the driver thereof had ridden home in it contrary to the express orders of the defendant and without his knowledge or acquiescence. *Martin v. Bus Line*, 720.

4. Where the plaintiff's evidence in his action against the owner of an auto-truck for damages resulting from the negligence of the de-

MASTER AND SERVANT D *b—Continued.*

fendant's driver tends to show that a truck was found on the highway on a business day during business hours and was operated by the regular employee of the defendant, whose regular business or employment was the duty of driving and operating the said truck: *Held*, the evidence is sufficient to furnish a basis for a jury to infer that the truck at the time was being operated in the furtherance of the master's business, and makes out a prima facie case, and upon contradictory evidence, the question is for the jury. *Jeffrey v. Mfg. Co.*, 724.

E Federal Employers' Liability Act.

a In What Cases Federal Statutes and Decisions Apply

1. In an action brought under the Federal Employers' Liability Act in the State Court against a railroad company to recover damages caused to a servant, the Federal statutes and decisions control. *Potter v. R. R.*, 17.

2. The liability of a railroad company to its employees for injuries sustained by him while engaged in interstate commerce, in an action brought in the State courts, is governed by the Federal Employers' Liability Act and the Federal decisions thereunder. *Austin v. R. R.*, 319; *Candler v. R. R.*, 399.

b Nature, Grounds, and Extent of Master's Liability Under Federal Act

1. The duty of a railroad company to provide for its employees engaged in interstate commerce reasonably safe and suitable cars, engines, appliances, machinery, track, roadbed, works, etc., "or other implements" as required by the Federal Employers' Liability Act is held to mean such instrumentalities and appliances as are personal or movable, or implements and appliances of manual operation, and where such negligent failure is relied on in respect to such "appliances," defendant's motion as of nonsuit will be granted unless there is some evidence that the implements complained of fall within the class intended by the Federal Statute. *Potter v. R. R.*, 17.

2. A railroad company engaged in interstate commerce owes to its employee the duty to use due care to furnish him a reasonably safe place in which to work. *Candler v. R. R.*, 399.

3. While it is the nondelegable duty of the railroad company to furnish its employees engaged in interstate commerce a reasonably safe place to work, in the exercise of due care, the plaintiff's evidence is insufficient when it tends only to show that he was experienced in the work, and that the injury in suit occurred under the usual conditions ordinarily obtaining in like work, he being held to have assumed the risk under the Federal Employers' Liability Act, under which the action has been brought in the State Court, and defendant's motion as of nonsuit upon this evidence should be allowed. *Potter v. R. R.*, 17.

4. *Held*, in order for a recovery under the Federal Employers' Liability Act there must appear under the evidence that the defendant was guilty of some negligence or the violation of a Federal statute which proximately caused the injury in suit. *Austin v. R. R.*, 319.

MASTER AND SERVANT E *b—Continued.*

5. Where the evidence tends only to show that the plaintiff's intestate was employed by the defendant as a track inspector, and that he was found one morning, after a severe storm during the night, near the track under circumstances tending to show that he had been struck by one of the defendant's trains, with further evidence that he had been continuously at work for a length of time in excess of that allowed by the Federal Statute, without evidence as to how the injury occurred: *Held*, the evidence raises conflicting inferences in favor of both parties and falls within the field of conjecture, and, the burden being on the plaintiff to establish negligence of the defendant and the causal connection between it and the injury, defendant's motion as of nonsuit should have been granted. *Ibid.*

6. Under the facts of this case *Held*, contributory negligence of plaintiff's intestate, in an action against a lumber company to recover damages for the wrongful death of the intestate, caused while working on defendant's logging road, is not a bar to recovery, but was properly considered upon the question of diminution of damages, and the evidence of defendant's negligence was sufficient to be submitted to the jury and to overrule its motion as of nonsuit. *Stamey v. Lumber Co.*, 391.

7. Where the jury has found the issue of negligence in favor of the plaintiff and the issue of contributory negligence in favor of the defendant railroad company in an action in the State court for the negligent killing of the plaintiff's intestate while he was engaged in interstate commerce, under the Federal Employers' Liability Act, the plaintiff's right to recover is not barred, but the amount of damages are properly reduced under the rule of comparative negligence. *Candler v. R. R.*, 399.

8. Where there is evidence tending to show that a conductor of the defendant railroad company, was struck and injured while crossing the defendant's tracks in the performance of his duties in interstate commerce by the negligence of an independent crew of another of defendant's trains in shunting a car a distance of two hundred yards without warning to persons or employees rightfully in the yard, in violation of rules of defendant, with conflicting evidence as to whether plaintiff's intestate knew of the customary violation of the rule, with further evidence of contributory negligence: *Held*, defendant's motion for judgment as of nonsuit was properly denied. *Ibid.*

MATERIALMEN—Liens of, see Laborers' and Materialmen's Liens.

MENTAL CAPACITY—To commit crime see Criminal Law B a—To make deed see Deeds and Conveyances A g.

MONEY RECEIVED.

A Liability for Money Received.

a Money Belonging to Another in Good Conscience in General

1. Where an infant by his next friend has recovered judgment against another for a negligent personal injury, and included therein is the

MONEY RECEIVED A *a—Continued.*

hospital expenses incident to the injury, and the judgment has been paid, the hospital may recover upon *quantum meruit* the amount of money so adjudicated for its services as for money had and received to its use. *Cole v. Wagner*, 692.

MORTGAGES (Right of mortgagee to proceeds under loss payable clause see Insurance N c—Cancellation for fraud see Cancellation of Instruments A b—Inchoate dower in mortgaged lands see Dower B b 2).

E Assignment of Mortgage or Debt.

a Rights of Assignee

1. The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, C. S., 2591, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. *Davis v. Ins. Co.*, 617.

F Transfer of Mortgaged Property.

b Rights and Liabilities of Purchaser of Equity of Redemption

1. The grantee in a deed to lands subject to an existing mortgage recited therein does not personally assume the mortgage indebtedness by accepting the deed unless the language thereof clearly imports that he does so. *Harvey v. Knitting Co.*, 177.
2. Where the owner mortgages his property and later agrees with the mortgagee that a part of the mortgaged premises be released from the mortgage and sold partly for cash with notes for the balance taken and secured by a mortgage from the purchaser of the released part, and that the original mortgagee hold the notes and mortgage on the released part as security for the original mortgage debt, the execution of the original mortgage is in itself an application of the mortgaged premises to the security of the debt and includes the substitution in part therefor of the mortgage of the released part, and the original mortgagor is entitled to have the proceeds of the notes, as they are paid, applied to his debt, and the purchaser of the original equity of redemption is subrogated to the right of the mortgagor in this respect. *Ibid.*
3. Where the mortgagor, under agreement with the mortgagee, sells a part of the premises mortgaged for a cash payment and notes for the balance secured by a mortgage from the purchaser, and the original mortgagee holds such notes as security for the original debt, and thereafter a receiver is appointed for the original mortgagor, who sells the property at judicial sale under order of court, the purchaser at the judicial sale, not assuming the amount of the original mortgage in his deed, is subrogated to the rights of the original mortgagor and is entitled to have the proceeds of the notes applied to the original mortgage as they are paid as against the other creditors of the insolvent mortgagor. *Ibid.*

MORTGAGES F—*Continued.*

c Transfer to Mortgagee and Presumption of Fraud Therefrom

1. In order for fraud to be presumed from the mortgagee's obtaining a deed from the mortgagor the deed must be a conveyance of the mortgaged premises, and the presumption does not apply when the mortgage is upon a distinct and separate tract owned by the husband of the mortgagor. *Tull v. Harvey*, 329.

H Foreclosure (Rights of parties upon foreclosure on home site see Home Site A b 1—Provision for acceleration in mortgage does not affect notes see Bills and Notes D a 1).

a Nature of Foreclosure and Acts Constituting Foreclosure

1. Where the receiver of the insolvent husband, under order of court, sells and conveys the husband's lands, and the husband and wife join in his deed under agreement that her right of inchoate dower should attach to the proceeds, and the land sold is subject to prior mortgage liens which the purchaser at the sale assumes, the effect of the transaction is not a foreclosure of the mortgaged property either technically or substantially. *Blower Co. v. McKenzie*, 152.

b Right to Foreclosure and Defenses (Right of assignee of mortgagee to foreclose see Mortgage E a 1)

1. An usurious charge of interest does not affect the validity of a mortgage, and an injunction against foreclosure will not be granted on the ground of usury. *Newberry v. Draughon*, 298.

2. The plaintiff in a suit to enjoin the foreclosure of a mortgage on his lands upon the ground that he does not owe the entire amount claimed in that usury was charged in the notes secured by the mortgage, must pay the amount admitted to be due with six per cent interest, or the temporary restraining order theretofore issued will be dissolved upon the principle that one seeking equity must do equity. *Edwards v. Spence*, 495.

e Parties

1. Where the decree of foreclosure of a mortgage has been made by the court with the provision that all junior lien holders be notified of the time and place of the sale and to show cause at the next succeeding term why they should not be bound by the decree and sale, their rights are protected by the decree and the refusal of the court to continue the action for foreclosure so that they might be made parties is not held for error under the facts of this case. *Davis v. Ins. Co.*, 617.

l Disposition of Proceeds and Surplus

1. Where the plaintiff has obtained a judgment in the court of a justice of the peace, and has had it recorded in the Superior Court, his remedy to have the surplus after the foreclosure of a prior mortgage subjected to the payment of the judgment is by independent action against the parties interested in the fund, and not by motion in the original cause to make the mortgagee show cause why this should not be done. *Skinner v. Coward*, 466.

2. A mortgagee who has foreclosed his mortgage on lands and has a surplus beyond the mortgage debt is not required to search the record and is not fixed with notice of an existing judgment against

MORTGAGES H *l—Continued.*

the mortgagor duly recorded subsequent to the registration of the mortgage, and after a time he is presumed to have distributed the surplus according to law, and actual notice by the judgment creditor of the existence of the judgment, given seven years after the foreclosure sale, will not fix the mortgagee with liability therefor. *Ibid.*

m Title and Rights of Purchaser at Sale and His Vendees

1. The sale of land under foreclosure of a mortgage or deed of trust is only voidable for failure to advertise for the period of time fixed by law, and the innocent purchaser at the foreclosure sale, without notice of an irregularity, acquires the absolute title which he may convey to another who likewise holds it unaffected by the infirmity, if he has not participated in the fraud or irregularity. *Brown v. Sheets*, 268.

2. The purchasers of land at a foreclosure sale of a mortgage thereon acquire title free from the lien of a judgment docketed subsequently to the proper registration of the mortgage. *Skinner v. Coward*, 466.

o Reopening and Resale

1. Under the provisions of C. S., 2591, relating to the foreclosure of mortgages, it is the duty of the clerk of the Superior Court to readvertise and resell the mortgaged property as often as the statute is complied with and the money for the advance bid deposited and the bid made within ten days from the date of the sale, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with. *Hanna v. Mortgage Co.*, 184.

2. While the clerk of the Superior Court is without authority to order a resale of lands foreclosed under mortgage without an increase bid filed with him under the provisions of C. S., 2591, and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect mortgagor, and when within the statutory time limit the offerer has communicated with the clerk of the court by phone and offered to come from an adjacent town and make a sufficient deposit, and is informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check is accordingly mailed, a substantial compliance with the statute has been made, though the check was received by the clerk after the expiration of the time limit of the statute. *Banking Co. v. Green*, 534.

p Setting Sale Aside for Irregularities

1. Where lands have been foreclosed under mortgage or deeds of trust and many times resold under the provisions of C. S., 2591, and the owner of the equity of redemption has not protected himself at the sales, he may not have the deed at the final foreclosure sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith. *Brown v. Sheets*, 268.

"MOTOR-DRIVEN CAR" see Insurance R a 2, 3.

MUNICIPAL CORPORATIONS (Election of officers see Elections—Bonds see Taxation).

B Governmental and Private Powers and Functions.

a Powers of Municipal Corporations in General

1. The powers of a municipal corporation are those granted in express words or necessarily implied thereby, incident or essential to the declared objects and purposes of the corporation as ascertained from the interpretation of its charter, and special and general statute and the organic law. *Holmes v. Fayetteville*, 740.

d Private or Quasi-Public Powers

1. Where a city has its own poles and electric wires for the supplying of electric current supplied under the contract with a private corporation to supply it, with the statutory authority to furnish for profit individuals, corporations, etc., within the limits of the city and a territory extending three miles in all directions therefrom, it is not inhibited by the State or Federal Constitutions from supplying such current to another corporation for the purpose of furnishing electricity to consumers within the city limits of its extended territory when such service does not affect the service rendered in this respect to its own citizens, and tends to diminish and not to increase the rate of taxation of its citizens, and this is not objectionable on the ground that it does not contribute to the fulfillment of its municipal functions as an agency of the State Government for local purposes. *Holmes v. Fayetteville*, 740.

2. A municipality has the power to purchase electricity for its own use and the use of its citizens, and where it is authorized by general and special statutes to purchase current from a power company and to resell and distribute it at a profit to its citizens and to those within a three-mile zone therefrom, the grant of power to do so is effective in law under the authority of the Legislature to grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established unless prohibited by the organic law. Article VIII, section 4; C. S., 2807, as amended; Private Laws 1929, ch. 190. *Ibid.*

D Officers, Agents and Employees.

a Election, Appointment, Expiration of Term and Abolition of Office

1. An act authorizing a municipality to create in its discretion an office local thereto implies the power to abolish the office, the act being a valid delegation of legislative power in exception to the general rule, and one accepting the position cannot acquire a vested right therein by contract for a definite term of employment. *Simmons v. Elizabeth City*, 404.

E Torts of Municipal Corporations (Damages to land by sewerage plant see Eminent Domain C c 2).

a Governmental and Corporate Functions

1. A city is not liable in damages for negligence causing injury or death to its employee while performing his duty as such in connection with removing a wire on a pole used by the city in connection with its police and fire alarm system. *Cathey v. Charlotte*, 309.

MUNICIPAL CORPORATIONS—*Continued.*

G Public Improvements.

a Power of City to Make Improvements or Grant Aid Therefor

1. Where a railroad company by proceedings in mandamus has been compelled to construct an underpass for a street crossing, the city has the power to sign an agreement in the proceedings obligating itself to pay for street improvements along the underpass, and where this has been done the city may accept the signature of the railroad company to a petition to improve the street as an owner of lineal feet abutting thereon and to pay the part assessed against such right of way for the improvements, and where the relevant provisions of the statutes in regard to street improvements have been complied with this furnishes no evidence of fraud. C. S., 2705, 2706, 2708, 2709, 2710, 2711, 2712, 2713, 2714. *Jones v. Durham*, 127.

b Petition for Improvements and Preliminary Proceedings

1. The right of way of a railroad company abutting on a street proposed to be improved by a city is properly included in the lineal feet in the petition for improvement under the provisions of C. S., 2707, requiring that a petition for local improvement shall be signed by at least a majority of the owners representing at least a majority of all the lineal feet of frontage upon the street, etc., proposed to be improved. *Jones v. Durham*, 127.

2. Where the municipal authorities have approved the petition of owners of land abutting upon a street proposed to be improved in accordance with the provisions of statute, their approval and order for the improvements to be made is final, except where it appears from the face of the petition, as a matter of law, that the signers do not represent a majority of the owners or of the lineal feet required by statute. *Ibid.*

c Assessments Therefor and Lien

1. An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself. The provisions of C. S., 93, as to the order of payment of debts of the deceased has no application. *Carawan v. Bennett*, 511.

d Enforcement of Assessments and Procedure of Those Objecting Thereto

1. The remedy of owners of property abutting upon a street proposed by petition to be improved, assessing the land of such owners, is given by statute, C. S., 2714, providing them an opportunity to be heard, and the right of appeal to the Superior Court by giving notice of appeal within ten days after confirmation by the municipal authorities, and when this has not been done, and the work has been completed, injunctive relief against the collection of the assessments by the city will not lie. *Jones v. Durham*, 127.

MUNICIPAL CORPORATIONS G *d—Continued.*

2. Where notice of appeal from the levying of assessments for street improvements had not been given by the property owner objecting thereto within the statutory time limit for the giving of such notice, the entry on the books of the city commissioners, made after the expiration of the statutory time limit, that the owner had appealed therefrom is not a waiver of the requirements of the statute in this respect. *Noland v. Asheville*, 300.

J Actions.

a Parties and Process

1. In an action by a taxpayer, in behalf of himself and others, to vacate and set aside a deed to the city by a cemetery association on the ground of collusion and fraud between the association and the two commissioners who since have been succeeded by others, but were in office at the time of the issuance of the summons: *Held*, as the city officials were in office when the action was commenced the service was proper, and an allegation of demand upon and refusal of the city to bring suit was not required, and upon the facts of this case, the defendant's plea in bar was properly overruled with leave to file answer. *Atkinson v. Greene*, 118.

MURDER see Homicide.

NEGLIGENCE (Of master see Master and Servant C, D—Of power companies see Electricity—Of railroads see Railroads D—Of manufacturer of food see Food—In driving on highway see Highways B—Sufficient for manslaughter see Homicide C a—Wife's right of action for negligent injury to husband see Husband and Wife B c—Acts of mercy to injured not admission of liability see Evidence F b 1).

A Acts or Omissions Constituting Negligence.

b Due Care

1. The degree of care which a person is required to exercise in a particular situation to absolve himself from the imputation of negligence may vary with the obviousness of the risk; but with respect to his liability, the ultimate question is whether he exercised due or commensurate care under the circumstances. The former doctrine of degrees of negligence disapproved. *Watson v. Construction Co.*, 586.

c Condition and Use of Lands, Buildings, etc.

1. The owner of a store for the sale of merchandise is not an insurer of the safety of its customers or invitees therein, but is liable only for injuries resulting from failure to exercise reasonable care to provide for their safety while on the premises; and where there is evidence tending only to show that the plaintiff was injured while coming down the stairs of the store by a fall caused by her heel catching in a piece of metal strip two inches wide lying one-sixteenth of an inch above the wooden tread of the step, the tread being nine inches and the rise of the step eight inches, and the width of the stair being four feet, with a hand-railing on each side: *Held*, the injury could not have been reasonably anticipated, but resulted from an accident, and defendant's motion as of nonsuit should have been granted. *Bohannon v. Stores Co.*, 755.

NEGLIGENCE A—*Continued.*

d Anticipation of Injury

1. Evidence tending to show that the defendant while endeavoring to get his family automobile from the garage on ground covered with ice and snow had planks placed under the wheels of the machine which were thrown, by the spinning of the wheels, against the plaintiff, his wife, as she stood watching him about fifteen feet from the rear of the car, causing her serious injury: *Held*, injury from the act could not have been foreseen by the defendant as an ordinarily prudent man, but would have required omniscience, and the defendant is not liable in damages, and a judgment as of nonsuit should have been granted on his motion. *Gant v. Gant*, 164.

2. Where the *alter ego* of a principal gives an employee a box of dynamite caps to take to a tool-house, and the lid of the box is sprung, allowing, from conjecture, some of the caps to escape from the box into the pocket of the employee, where they exploded the next day: *Held*, the defendant cannot be held to have reasonably anticipated that any harm would result from the fact that the lid of the box was sprung, and he is not liable in damages for the injury resulting therefrom. *Watson v. Construction Co.*, 586.

e Res Ipsa Loquitur (See, also, Master and Servant C a 2, C b 4)

1. The question of whether the doctrine of *res ipsa loquitur* applies to a given state of facts is one of law for the court, and when facts upon which the doctrine applies are established the reasonableness of defendant's explanation is for the jury. The principles upon which this doctrine rests discussed by BROGDEN, J. *Springs v. Doll*, 240.

2. Upon evidence tending to show that the plaintiff as an invited guest was riding in the defendant's car with the defendant driving, and that the latter was forced from the highway by a truck negligently driven thereon, causing her car to skid on the wet road, which resulted in the injury in suit, the doctrine of *res ipsa loquitur* does not apply, and the jury's verdict that the defendant was not guilty of negligence is upheld under the facts of this case. *Ibid.*

B Proximate Cause.

c Intervening Causes

1. Where a passenger in an automobile is injured in a collision of an automobile and a train at a grade crossing, and sues the railroad company for damages resulting therefrom, and his own evidence tends only to show that the accident resulted from the negligent driving of the automobile by another, and that this negligence of the driver was the sole proximate cause of the injury, or that cause which acting in unbroken sequence produced the injury, and without which it would not have occurred, and that the negligence of the railroad company, if any, would not have caused injury except for the intervening negligence of the driver: *Held*, the railroad company is not liable in damages to the plaintiff, and a judgment as of nonsuit was properly entered. *Herman v. R. R.*, 718.

NEGLIGENCE—*Continued.*

C Contributory Negligence.

a Of Persons Injured in General (Of servant see Master and Servant C g—on highway see Highways B g)

1. Where one seeks to recover damages for a negligent personal injury resulting from his diving into the shallow water of a public swimming pool, about twenty feet from the diving board, and hitting his head on the concrete bottom, his own negligence in not ascertaining the depth of the water before diving will bar his recovery. *Richardson v. Ritter*, 108.

2. In an action to recover damages for an injury alleged to have been negligently caused by the defendant, plaintiff's contributory negligence that will bar his recovery is that which, concurring and cooperating with the negligence of the defendant, becomes the real, efficient and proximate cause of the injury, or that cause without which the injury would not have occurred, and it is not necessary that the plaintiff's negligence be the sole proximate cause. *Davis v. Jeffreys*, 712.

d Burden of Proving Contributory Negligence

1. The burden of proof is on the defendant on the issue of contributory negligence in a personal injury action. *Lipscomb v. Cox*, 64.

D Actions for Negligent Injury.

c Nonsuit

1. Where the evidence offered by the plaintiff shows contributory negligence barring his right to recover a nonsuit is proper. *Krouse v. R. R.*, 541; *Davis v. Jeffreys*, 712.

2. Where evidence discloses that intervening negligence of third person was sole proximate cause of injury nonsuit is proper. *Herman v. R. R.*, 718.

NEW TRIAL.

B Grounds Therefor.

g Newly Discovered Evidence

1. The party moving for a new trial upon the ground of newly discovered evidence must show to the sound discretion of the trial court, its materiality and competency, and that he was not guilty of laches in not discovering it in time for introduction at the trial, and that the evidence is not merely cumulative and its reception would probably change the verdict as rendered. *Brown v. Sheets*, 268.

2. A motion for a new trial will not be granted where the newly discovered evidence is not material to the answer to the issue and its consideration would not tend to vary the result. *Connor v. Mfg. Co.*, 66.

NONSUIT see Trial D a.

NORTH CAROLINA—Highway Commission see Highways A—Industrial Commission see Master and Servant B—Park Commission see Eminent Domain B a.

NUISANCE—Attractive, see Electricity A b.

"OFFICE" see Municipal Corporation D a.

OFFICERS—Surety bonds of see Principal and Surety B c—Election of see Elections.

OPTION see Vendor and Purchaser.

PARENT AND CHILD—Abandonment of child see Husband and Wife A a 1, A d 1—Liability on child's contract see Infants B a 3—Liability for injuries to third person by son in employment see Master and Servant D b 1.

PARK COMMISSION see Eminent Domain B a.

PARTIES—Misjoinder of parties and causes see Pleadings D b—Right of alien to sue in this State see Aliens A a—Joinder of husband or wife see Husband and Wife F a—In action to foreclose see Mortgages H e—Who may move to dismiss appeal from commission see Corporation Commission C a—In action against railroad under Federal control see Railroads E a).

B Defendant (Fraudulent joinder see Removal of Causes C b).

a Necessary Parties Defendant

1. In an action against the vendee under a conditional sales contract the joinder of one claiming title as purchaser for value from the vendee is not objectionable, the subject of the action being the same, and the claimant in possession being a necessary party to the action. *Music Store v. Boone*, 174.

2. An estate for life conveyed by deed upon conditions affecting a reversion cannot be judicially determined when the heirs at law of the deceased grantor having a possible interest therein are not made parties, and when this defect of parties appears on the record the Supreme Court will remand the case in order that they may be joined. *Hamilton v. Henderson*, 353.

PARTITION—Setting aside partition sale see Judicial Sales B, C.

PARTNERSHIP.

D Rights and Liabilities as to Third Persons.

a Partnership Acts in General

1. Where a partnership executes a contract to purchase a certain tract of land, and the agreement is executed in the name of one of the partners for the firm as a matter of convenience, and the deed made to him upon his execution of a mortgage and notes for the purchase price, it may be shown that the transaction was a partnership act and that the partnership was liable thereon. *Justice v. Sherard*, 237.

2. A complaint alleging that the plaintiff at the request and for the convenience of the defendants made a deed to a certain tract of land to one of them for the benefit of them all in which the grantee assumes the obligation of a prior mortgage for them all, and that the grantee defendant subsequently conveyed to the other defendants upon like condition their proportionate share, specifying the

PARTNERSHIP D *a—Continued.*

interest of each, states a cause of action as to each, and a demurrer thereto, on the grounds of misjoinder of parties and causes of action and that it fails to allege a cause of action, admits the truth of the allegations, and is properly overruled. *Coxe v. Dillard,* 344.

PAYMENT see Bills and Notes; Principal and Surety A c 1.

PHYSICIAN AND PATIENT—Communications between see Evidence D e.

PLEADINGS (Indictment see Indictment—Of usury see Usury C a—Admissibility in evidence see Evidence F e—Appeal from refusal of judgment on see Appeal and Error A d 1).

A Complaint.

b Verification

1. Objection to the sufficiency of the verification of the complaint by plaintiff's next friend on the ground that the affiant had no personal knowledge of the matters alleged will not be sustained when the allegations are not made to appear to be outside the personal knowledge of the affiant. *Foster v. Hyman,* 189.

e Amendment

1. A demurrer to a complaint will be sustained upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power, in the exercise of his sound discretion, to allow the plaintiff to amend the original complaint upon motion made within ten days after receipt by the clerk of the Superior Court of the certificate showing that the judgment of the Superior Court had been affirmed. C. S., 515. *Morris v. Cleve,* 253.

2. The judge of the Superior Court has plenary power to permit amendments to the pleadings when the amendment does not substantially change the cause of action originally alleged or set up a new cause of action. *Bridgeman v. Ins. Co.,* 599.

B Answer.

f Matters in Abatement

1. Where it does not appear upon the face of the complaint that another action is then pending in another county in which the same relief could be obtained, the objection may be taken by way of answer. C. S., 517. *Bank v. Broadhurst,* 365.

C Counterclaim and Set-off.

c Effect and Subsequent Pleadings

1. Public Laws of 1924, ch. 18, providing that an answer of defendant setting up a counterclaim will be deemed denied unless a copy thereof is served on the plaintiff or his attorney, is not referred to in Public Laws of 1927, ch. 66, and construing the two acts together there is no repugnancy between them so as to repeal by implication the former law on the subject. *Lumber Co. v. Welch,* 249.

PLEADINGS—*Continued.*

D Demurrer (Right of appeal from judgment overruling see Appeal and Error A c—Question presented for review upon appeal from see Appeal and Error J f—Usury may not be taken by demurrer see Usury C a 1—Demurrer to complaint alleging ratification of fraud see Fraud B c 1).

a On Ground that Complaint Fails to Allege Cause of Action (In action for negligence on highway see Highways B h 1)

1. A demurrer to a pleading on the ground that the complaint does not state a cause of action will not be sustained if its allegations are sufficient to state a good cause, and facts establishing its insufficiency may not be pleaded in the demurrer. *Justice v. Sherard*, 237.

2. Where the complaint alleges that a partner purchased a certain tract of land for the partnership, but in his own name for the convenience of the partnership, and the deed is taken in the name of the partner and the mortgage and notes for the purchase price are executed by him, a demurrer by the other partners on the ground that a cause of action is not stated against them is bad, since it may be shown that the transaction was a partnership undertaking and that the partnership was liable. *Ibid.; Coxe v. Dillard*, 344.

3. A demurrer to the complaint on the grounds that it does not state a cause of action does not deal with the merits of the controversy, but only with the sufficiency of its allegations, admitting them to be true for the purpose. *Morris v. Cleve*, 243; *McDaniel v. Trent Mills*, 342.

4. Where allegations in a complaint are insufficient to state a cause of action to set aside a deed for fraud, but sufficient to state a cause of action against the grantee therein for failing to account for the purchase price, a demurrer to the complaint is properly sustained on the first cause of action, and overruled as to the second, and the trial court properly retains the second cause for trial, and may permit the plaintiff to amend her complaint as to the second cause in proper instances. *Tull v. Harvey*, 329.

5. Where the defendant's motion for judgment upon the pleadings and that the action be dismissed is in the nature of a demurrer *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action, C. S., 511(6), the pleadings will be liberally construed with a view to substantial justice between the parties. C. S., 535. *Cole v. Wagner*, 692.

6. Where in an action by the trustees of a hospital against a minor and his guardian it is alleged that the hospital gave the infant medical attention necessary to save his life and usefulness after his injury in an accident, and that the guardian of the infant had recovered judgment for the negligent injury, and that hospital and medical attention was a substantial part of the consideration of the judgment recovered by the guardian of the infant: *Held*, the allegations are not so vague and uncertain as to fail to state a cause of action, but allege a cause of action upon *quantum meruit* and for money had and received, and the defendants should have asked, if they desired the complaint to be made more definite, for a bill of particulars, C. S., 534, or move that the plaintiff be required to amend. C. S., 537. *Ibid.*

PLEADINGS D *a—Continued.*

7. Upon a demurrer the pleadings are liberally construed in the light most favorable to the pleader, and where there are conflicting allegations, and one of them is sufficient to allege a cause of action, the demurrer thereto will not be sustained. C. S., 535. *Lee v. Produce Co.*, 714.

b Misjoinder of Parties and Causes of Action

1. Where a sheriff has been elected for successive terms of office, and appointed for a third term by the county commissioners after the office for his third term had been declared vacant, an action against him and the sureties on his bonds given under the provisions of C. S., 3930, for defalcation during the successive terms is a misjoinder of parties and causes of action, and a demurrer thereto is good. *Pender County v. King*, 50.

2. A demurrer for defect of parties and causes of action will not be sustained where the debt alleged relates to parties not necessary to the proper determination of the action. *Shuford v. Yarborough*, 150.

3. A suit by the receiver of a corporation against its defaulting officer and the surety or guarantor for his honesty or fidelity is not objectionable as a misjoinder of parties and causes of action, the alleged default of the principal having occurred that created the surety's liability within the terms and conditions of its bond. *Ibid.*

4. Where an action is instituted against two defendants and only one of them is served with summons and the action is solely against the one served and this appears from the face of the complaint, a demurrer for misjoinder of parties and causes of action is properly overruled. *C. I. T. Corp. v. Drake*, 162.

5. A complaint in proceedings by the wife under the provisions of 3 C. S., 1667, for allowance for subsistence and counsel fees, with allegations that the husband had fraudulently conveyed his lands to his father under a conspiracy to defraud the plaintiff out of her marital rights, and afterwards had grossly abused her and coerced her into accepting a deed of separation is good, and a demurrer thereto for misjoinder of parties and causes of action should be overruled, the various causes for which relief is sought being based on a conspiracy or arising out of the same subject-matter or transaction. *Taylor v. Taylor*, 197.

6. Failure to demur to the pleadings upon the ground of misjoinder of parties and causes of action or to take exception thereto on these grounds is a waiver of the right. *Morris v. Cleve*, 253.

c Speaking Demurrer

1. Where the complaint alleges that a written contract in the name of one partner was in fact for the benefit of them all and a partnership act, and so recognized by them all, a demurrer on the grounds that it fell within the meaning of the statute of frauds as being a promise to answer for the debt or default of another, or that the defendants were estopped by the written contract from showing parol matters contrary to its terms, is bad as a "speaking demurrer" and is properly overruled. *Justice v. Sherard*, 237.

PLEADINGS D—*Continued.*

d When Demurrer May be Taken

1. A motion which is in effect to the sufficiency of the complaint to allege a cause of action, or in the nature of a demurrer *ore tenus* may be taken at any time, or the Supreme Court may take knowledge thereof on appeal on its own motion. *Cole v. Wagner*, 692.

2. Demurrer to the sufficiency of the complaint to state a cause of action may be made at any time, though answer has been filed, in the Superior Court or in the Supreme Court, or the Supreme Court on appeal may take cognizance thereof *ex mero motu.* C. S., 518. *Power Co. v. Peacock*, 735.

e Effect of Sustaining or Overruling Demurrer and Subsequent Pleadings and Procedure

1. Where the trial court enters a judgment sustaining a demurrer to the complaint and therein grants the parties additional time to file amended pleadings in his plenary discretionary power, the order sustaining the demurrer, unappealed from, does not work an estoppel upon the plaintiff to proceed on the amended pleading. *Bowie v. Tucker*, 671.

2. Where a demurrer to a complaint in a civil suit on the ground of its insufficiency to state a cause of action, has been overruled, the procedure for the defendant is to except and duly appeal to the Supreme Court, and where he has appealed, but has failed to prosecute it, he may not plead and again demur before another judge of the Superior Court at a subsequent term of court, the action of the former judge in refusing the motion being conclusive. C. S., 601. *Power Co. v. Peacock*, 735.

3. Demurring *ore tenus* to the sufficiency of the complaint to state a cause of action after a former judge has refused the motion is in effect appealing from one Superior Court judge to another upon matters of law or legal inference which is the sole province of the Supreme Court under the provisions of our State Constitution, Art. IV, sec. 8. *Ibid.*

POWER COMPANIES see Electricity.

PRIMA FACIE CASE see Master and Servant D b 4.

PRINCIPAL AND AGENT.

A The Relation.

b Determination as to Whether Party is Agent or Independent Dealer

1. The form of a written contract for the local sale of automobiles will not control the question of whether the local representative is a purchaser thereof or an agent therefor, but the correct interpretation of the writing itself as to its effect will fix the status of the local representative in this respect. *Ford v. Willys-Overland*, 147.

2. Where a partnership has a written agreement for the local sales of automobiles and thereafter the partnership is incorporated and continues to act under the agreement with the implied acquiescence of the company distributing the automobiles to local dealers, the unmodified or original agreement will govern the relationship as to whether the corporation was an independent local dealer purchasing the machines or a sales agent. *Ibid.*

PRINCIPAL AND AGENT A—*Continued.*

c Determination of Which of Two Parties Must Bear Loss Occasioned by Wrongful Act of Agent

1. Where the defendant purchased an automobile through a local dealer under a title retaining contract securing notes for monthly payments and was sued thereon by the financing corporation claiming as a holder in due course for value, and the defense of payment was pleaded with evidence tending to show that the defendant made payment through a third party who sent his certified check to the plaintiff for the full balance due by the defendant, and that the check was rejected by the plaintiff on account of a check given for a prior installment having been returned unpaid, and the rejected check was returned to the drawer and credited to his account, and the evidence as to whether the check was certified by the drawer or the payee was conflicting: *Held*, the question of whether the drawer was acting as agent of the purchaser or the seller should have been submitted to the jury under the evidence in this case. *Investment Trust v. Windsor*, 208.

2. Where the lender of money makes a loan secured by a mortgage on the land containing a warranty that the title was free from encumbrances, and has no actual knowledge of a prior registered mortgage, and sends its check payable to the attorney securing the loan and the borrower, and the borrower endorses the check and gives it to the attorney and trusts him to pay off the prior mortgage lien, the attorney is the agent of the borrower for the purpose of paying the prior mortgagee, and the lender may recover from the borrower upon the default of the attorney to pay off the existing mortgage lien and his appropriation of the money to his own use. *Bank v. Liles*, 413.

3. Where one of two parties must suffer loss by the fraud or misconduct of another acting as agent in the transaction between the contracting parties, he who reposes the confidence in the agent, or by whose negligent conduct makes it possible for the loss to occur, without the knowledge or concurrence of the other, must bear the loss, and *Held*, under the facts of this case, evidence of the declarations of the agent in respect to the transaction was incompetent as evidence. *Ibid.*

C Rights and Liabilities as to Third Parties.

b Powers of Agent

1. As between the vendor and purchaser it is immaterial in what form the agent authorized to purchase certain merchandise signed the contract, which in case of an incorporated agent is sufficient if signed by its president. C. S., 1139. *Pick v. Hotel Co.*, 110.

2. An agent appointed for the purchase of goods, without being given the money for which to pay for them, has implied authority to purchase them on the credit of his principal, and to do such other things in pursuance of the authority directly given as are reasonably necessary to consummate the transaction, and in this case, involving a large expenditure for the furnishing of a hotel, the execution of a contract wherein the vendor retained title for the security of the purchase price. *Ibid.*

PRINCIPAL AND AGENT C—*Continued.*

d Wrongful Acts of Agent

1. Where the applicant to a land bank for a loan negotiates his loan through an attorney, and represents in his application that the land upon which the proposed loan was to be made was free from mortgage liens or encumbrances, and in his deed of trust on the land securing the loan warrants the title to be free and clear from encumbrances, and thereupon after the investigation of the title for the land bank by the attorney and his certificate to the land bank, the loan is made by check payable to the attorney and to the borrower, and the latter endorses the check and gives it to the attorney with the understanding that the attorney should cancel a prior registered mortgage with the proceeds: *Held*, the negligence of the borrower in not personally seeing to the cancellation of the prior lien makes him liable to that extent to the lender upon the failure of the attorney to have it canceled and his appropriation of the money to his own use, and a directed verdict upon evidence establishing these facts is proper. *Bank v. Liles*, 413.

PRINCIPAL AND SURETY.

B Rights and Liabilities of Surety (On replevin bonds see Replevin G b—Joinder of principal and surety see Pleadings D b 1, 2, 3).

c On Bonds of Public Officers and Agents

1. A judgment upon the admissions in the answer of the administrator bank of a deceased county treasurer is not competent in an action by the county commissioners as evidence against the surety on the official bond of the deceased when the bank has been made a party defendant and the surety at once raises the issue as to whether a part of the defalcation was moneys defaulted from the bank when the deceased was acting as its assistant cashier, the interest of the bank and the surety being in conflict, and C. S., 358, not applying in such cases. *Commissioners of Chowan v. Bank*, 410.

2. Where a bank has received from the sheriff of the county funds of the county for deposit, and thereafter the bank becomes insolvent, and a judgment has been obtained against the surety on the sheriff's bond for the sum deposited, which has been paid, the effect of the judgment is to subrogate the surety to the rights of the county to a pro rated share in the distribution of the assets of the bank, and the sheriff being insolvent, a personal debt of the sheriff to the bank cannot be used as an off-set to the right of the surety thereto. *Indemnity Co. v. Corp. Com.*, 562.

3. The various bonds separately required to be given by the sheriff for the proper accounting for and paying of moneys received by him as sheriff by the provisions of C. S., 3930, impose a distinct liability on the sureties on each bond separately for the terms of office for which given, and where one is given by the same surety for the same sheriff for more than one successive term, the giving of the bond for the succeeding term does not discharge the bond previously given nor release the surety from liability thereon, and a separate cause of action lies against the surety on the bond for each term. *Pender County v. King*, 50.

PRINCIPAL AND SURETY B c—*Continued.*

4. The liability of a surety on a sheriff's bond, given under the provisions of C. S., 3930, is not affected by the fact that the sheriff, pending the life of the bond, has been put upon a salary instead of a fee basis, or the amount of his salary has been changed under the authority of a statute. *Ibid.*

5. Where under the provisions of C. S., 3932, the board of county commissioners has declared the office of sheriff of that county vacant for his failure to give the bonds required by C. S., 3930, and has appointed another who likewise failed to give the bonds, and has again appointed the former sheriff, who gives the necessary bonds and then qualifies, his term is by virtue of his appointment by the board of county commissioners, and the liability of the sureties on his official bonds commences from the time of his appointment. *Ibid.*

PROCESS—In action against city see Municipal Corporations J a 1.

PUBLIC IMPROVEMENTS see Municipal Corporations G.

QUASI CONTRACTS (For services rendered deceased see Executors and Administrators D a).

B Reasonable Value.

b Submission of Question to Jury

1. Where in an action upon *quantum meruit* the defense is interposed by the infant defendant that the amount sought to be recovered as necessary hospital expenses was excessive and exorbitant; the question is for the jury, the trial court having the power to set aside the verdict if excessive. *Cole v. Wagner*, 692.

QUIETING TITLE AND SUITS TO REMOVE CLOUD.

B Proceedings and Relief.

a Pleadings and Evidence

1. The defendant in an action to recover lands may maintain a counterclaim and ask that the plaintiff's claim be removed as a cloud on his title. *Sears v. Braswell*, 515.

QUO WARRANTO see Elections I a.

RAILROADS (As carriers see Carriers—Forfeiture of charter see Corporations K a, K b—Order requiring submission of plans for new station is appealable see Corporation Commission C c 1).

D Operation (Liability to employees see Master and Servant E).

b Duty in Regard to, and Accidents at Crossings

1. Where a railroad company has knowingly permitted automobiles and other vehicles to cross its right of way for a long period of time at a certain road crossing, from one public highway to another, it owes the duty to keep such crossing in a reasonably safe condition whether the crossing was constructed by the railroad company or not, and it is liable in damages for injuries proximately caused by its negligent failure to do so. *Stone v. R. R.*, 429.

2. Where a railroad company has knowledge that automobiles and other vehicles have been accustomed to cross its tracks at a certain

RAILROADS D *b—Continued.*

roadway, for a long period of time, it owes the duty to keep the crossing in reasonably safe condition for this purpose, and where there is evidence tending to show that the public had so crossed at this place for a long period of time and that the railroad company had left a hole on its right of way which caused plaintiff's automobile to get stuck and consequently struck by defendant's train, without fault or negligence on plaintiff's part, the question of defendant's actionable negligence is for the jury under correct instructions from the court. *Ibid.*

3. In an action to recover damages for the negligent killing of the plaintiff's intestate, evidence tending to show that the defendant's rapidly moving train collided with an automobile the plaintiff was driving at a much used public crossing, coming upon him without signal or warning at a place where the defendant's tool and supply houses obstructed the intestate's view so that he could not apprehend the danger in time to avoid it, is sufficient to take the case to the jury upon the question of whether the defendant's negligence was the proximate cause of the injury in suit. *Moseley v. R. R.*, 628.

4. Where the plaintiff's intestate has been killed in a collision of his automobile with the train of the defendant at a public crossing, and the question is involved as to whether the defendant negligently omitted to give warning of its approaching train, testimony of witnesses who were present that they did not hear the bell ring or the whistle blow is sufficient to take the case to the jury on this question. *Ibid.*

5. Where there is evidence that the defendant's train colliding with an auto truck of the plaintiff's intestate as he was attempting to cross the defendant's tracks at a public crossing, with the train speedily coming upon him without warning, the question is for the jury as to the negligence of the intestate in failing to stop before attempting to cross under the rule of the prudent man under the facts of this case. *Ibid.*

6. While it is negligence *per se* for a railroad company not to observe a statutory requirement of maintaining gates or safety devices, or watchmen at a grade crossing, it is also incumbent upon it, in the absence of statute, to do so when the crossing is much used by the public and is more than ordinarily dangerous, and the failure to do so would be a great menace to the public, and the question of whether or not such precautions were required is for the jury under correct instructions under the evidence in this case. *Ibid.*

7. Where the collision between an automobile and a train at a grade crossing is caused solely by the negligence of the driver of the automobile, an occupant therein may not recover damages for his injuries sustained therein from the railroad company. *Herman v. R. R.*, 718.

g Fires

1. In order for the plaintiff to recover damages from a railroad company for setting fire to his barn off the right of way by sparks from the defendant's locomotive, the burden is on the plaintiff to

RAILROADS D *g—Continued.*

show that the fire was caused by sparks from the locomotive, and then on the railroad company to show that its engine was properly equipped and operated, and upon supporting evidence the issue of negligence is for the jury, and the defendant's motion as of nonsuit is properly denied. *Heath v. R. R.*, 541.

2. Where there is evidence that plaintiff's barn off the right of way of the defendant railroad company was set afire by sparks from the defendant's locomotive shifting nearby, it is some evidence that the locomotive emitting the sparks was in a defective condition or that it was improperly operated. *Ibid.*

3. Evidence that the defendant railroad company's locomotive was shifting cars near the property of the plaintiff, throwing off heavy smoke with live sparks that were carried by the wind to the plaintiff's barn, off the right of way, and that soon thereafter the barn caught fire and was destroyed, and that there was at the time no fire on the plaintiff's premises which could have started the conflagration, is sufficient to be submitted to the jury upon the defendant's actionable negligence. *Ibid.*

4. Where there is evidence tending to show that defendant's locomotive was throwing off heavy smoke with live sparks which caused the fire in suit, testimony that the same locomotive on the night previous was emitting smoke and live sparks is competent upon the question of the defective condition of the locomotive on the issue of defendant's negligence in this respect. *Ibid.*

E Actions.

a Parties

1. A contract made with the Director General of Railroads during Federal control to the effect that the railroad would pay for a side track to plaintiff's manufacturing plant upon condition that the freight tonnage would amount to a certain quantity, which during Federal control it did not do, will not now lie against the railroad company operating its own road, the required tonnage being now the amount agreed upon, the agent designated by the President (U. S. Compiled Statutes, Cum. Sup. 1925, sec. 10071¼ cc) not having been made a party to the action. *Brick Co. v. R. R.*, 442.

RATIFICATION OF FRAUD see Fraud B c.

RECEIVING STOLEN GOODS.

D Verdict.

a Form and Requisites

1. Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he rereceived the goods is defective, and a *venire de novo* will be ordered on appeal. *S. v. Barbee*, 248; *S. v. Scurlock*, 475.

RECORDS—Torrens deeds see Deeds and Conveyances G.

REFERENCE—Right to trial by jury upon objection to order for, see Jury C a 1.

REGISTRATION—Of conditional sales see Sales I a—Under Torrens Act see Deeds and Conveyances G.

REMOVAL OF CAUSES.

A Right to Removal in General.

a Statutory Restraint on and Agreements in Charter Against Right to Removal

1. A nonresident insurance company has the right to remove a suit brought against it from the State to the Federal Court under the Federal removal statute, and the State statute, C. S., 6295, providing that upon its attempt to do so the insurance commissioner shall revoke its right to do business in this State is unconstitutional in this respect, and the right to removal obtains notwithstanding that under the statute the company has filed an application to do business in the State waiving its right to removal. *Rhodes v. Ins. Co.*, 337.

C Citizenship of Parties.

b Separable Controversy and fraudulent joinder

1. Upon a petition of the nonresident defendant for removal of the cause to the Federal Court for trial on the grounds of diversity of citizenship and separable controversy, the allegations of the complaint will alone be considered as to whether a joint tort is alleged, and where the allegations are sufficient and the resident defendant recognizes the jurisdiction of the State court by obtaining an extension of the time to answer, the petition for removal will be denied. *Cathey v. Charlotte*, 309.

2. Allegations in the complaint in an action for wrongful death that the plaintiff's intestate was an employee of a city and was injured by the joint negligence of the city and the nonresident telephone company in connection with removing, by order of the city, its wire, used in its police and fire alarm system, from a pole erected by the nonresident telephone company under authority of an ordinance requiring that sound poles be used, and that the injury resulted from defects in the pole causing it to break and throw plaintiff's intestate to the ground: *Held*, a cause of action against both defendants as joint *tort-feasors* is stated, and the petition of the nonresident defendant for removal of the cause to the Federal Court for trial should be denied. *Ibid.*

3. Where a city and a nonresident telephone company are sued in the State Court a joint tort causing the death of the plaintiff's intestate, and the city does not file a demurrer but obtains an extension of time in which to answer, the nonresident defendant cannot raise the question by its petition for removal of the cause to the Federal Court on the ground that the action is separable, whether or not the city was liable for that its employee was injured in the exercise of the city's governmental functions. *Ibid.*

4. An action against a nonresident corporation and its resident superintendent, brought by an employee who alleges that he was under the

REMOVAL OF CAUSES C *b—Continued.*

direction and control of the resident superintendent, and that both defendants were negligent in failing to provide a safe place to work, in changing the method of work without warning the plaintiff, in employing a dangerous method of doing the work, and in failing to warn and instruct the plaintiff as to the change of method of work: *Held*, the complaint alleges a joint *tort*, and the petition of the nonresident defendant for removal to the Federal Court will be denied. *Johnson v. Utility Co.*, 393.

5. An action against a nonresident corporation and its resident foreman, brought by an employee who alleges that he was under the direction and control of the resident foreman, and that both defendants were negligent in ordering the plaintiff to operate an "electrical stacker" and failing to instruct him how to use the machine which was new and not in general use, and in failing to give him a helper necessary for the safe operation, of the machine, and in failing to warn and instruct the plaintiff as to the danger incident to the work: *Held*, the complaint alleges a joint *tort*, and the petition of the nonresident defendant for removal to the Federal Court will be denied. *Slaughter v. Lumber Co.*, 395.

REPLEVIN—Claim and Delivery.

G Liabilities on Bonds and Undertakings.

b Liability of Surety

1. The sureties on a replevy bond in claim and delivery are parties of record in an action on the bond before final judgment has been rendered, and notice to the principal on the bond is sufficient notice to the surety of every motion or proceeding made in the ordinary and reasonable purview and compass of the action. *Land Co. v. Cole*, 452.

2. A judgment in claim and delivery proceedings which adjudicate and determine the rights of the parties to the action without reservation of further power by the court to proceed therein is a final judgment, and notice thereafter to the principal on the replevy bond of further proceedings therein on motion of a party, which substantially changes the effect of the judgment, is not notice to the sureties on his bond, the effect of the judgment being to terminate the agency of the principal in such instances, and judgment later rendered on the motion does not affect the liability of the sureties, and as to them it is void. *Ibid.*

F Trial and Judgment.

c Instructions

1. Where, in an action in claim and delivery involving the title to an automobile, there is evidence tending to show that the plaintiff bought the car for himself and *per contra* that he made a gift of the car to the two daughters by delivering the car with intent to pass title either to their father for them or to them direct, an instruction that limits the defense to the evidence to the effect of an immediate delivery by the father to his daughters and deprives the defendant of their defense upon the second phase thereof of the gift direct to the daughters is reversible error. *Harrill v. Tripp*, 426.

REPLEVIN F—*Continued.*

e Rendition and Form of Judgment

1. Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against him should require the delivery of the property with damages for its detention and costs and against the surety on the bond for damages and costs within the amount of the penalty thereon, or, in the event that delivery of the property cannot be had, for the value at the time of its wrongful detention with interest as damages therefrom, and costs, and likewise against the surety within the penalty of the bond, the surety to be discharged upon such payment. *Harrell v. Tripp*, 426.

RESERVATIONS see Deeds and Conveyances C d.

RES IPSA LOQUITUR see Negligence A e.

RESTRAINT OF TRADE see Contracts A f.

RULES OF COURT see Appeal and Error F b; E a, Criminal Law L.

SALES.

F Warranties (Measure of damages for breach of see Damages F b 1).

c Liability of Manufacturer or Distributor for Warranties Made by Agents or Independent Dealers

1. Where a contract creating a local representative for the sale of automobiles, by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on such warranty is properly nonsuited. *Ford v. Willys-Overland*, 147.

H Remedies of Buyer.

a Recovery of or Defense to Action for Purchase Price on Ground of Worthlessness of Article

1. Where a seller contracts for the sale of a cotton gin and delivers to the purchaser an article that is worthless except for junk, there is a failure of consideration, and evidence that the gin was worthless except for junk is admissible in the seller's action for the purchase price. *Hyman v. Broughton*, 1.

2. Where the article sold is worthless there is a failure of consideration and the vendee may resist the vendor's action for the purchase price without alleging or proving fraud in the procurement of the contract or compliance with a stipulation of the contract requiring that notice of defects and an opportunity to remedy same be given the vendor. *Ibid.*

3. Where in an action on a note, the evidence tends to show that the consideration for the note was certain shares of bank stock and the promise of the payee to make the payer a director of the bank, and that the payer was made a director and, acting as such director, voted for and received dividends upon his stock, the execution of the note being admitted, upon the later insolvency of the bank the payer may not maintain the position that there was a total failure

SALES H *a—Continued.*

of consideration, and an instruction that the jury should answer the issue of indebtedness in favor of the defendant if they found the stock to be worthless is reversible erorr. *Owens v. Carstarphen*, 424.

e Actions and Counterclaims for Breach of Warranty

1. The vendee may not recover damages for the delivery of a cotton gin on the ground that it was inferior in quality to the one purchased in the face of a stipulation in the written contract of sale that any agreement, verbal or otherwise, not in the writing would not be considered. *Hyman v. Broughton*, 1.

I Conditional Sales.

a Registration and Priority

1. Between the parties to a conditional sales contract probate and registration is not required by statute. C. S., 3312. *Pick v. Hotel Co.*, 110.

2. Where a chattel mortgage for the purchase price of an automobile expressly retains title to the automobile and all improvements made thereon, and stipulates that the giving of possession thereof to the purchaser was not to pass title to him, and the instrument is duly registered, the purchaser during the continuance of the contract may have repairs made that are necessary for its operation, and the seller's mortgage is superior to a mortgage for repairs given to a mechanic in lieu of his mechanic's lien which he had lost by surrender of possession of the car. *Motor Co. v. Motor Co.*, 371.

b Rights of Parties Under Unregistered Conditional Sales Contracts

1. An unregistered conditional sales contract is valid as against all persons except creditors and purchasers for value, and upon conflicting evidence as to whether one defendant was a purchaser for value from the vendee under the conditional sales contract, the issue is properly submitted to the jury, and a motion as of nonsuit is properly denied. C. S., 3311, and *held further:* joinder of vendee and one claiming as innocent purchaser for value from him is not misjoinder. *Music Store v. Boone*, 174.

d Form, Requisites and Validity of Conditional Sales Contract

1. The description in a chattel mortgage for the purchase price of an automobile "one S. H. Coupe No.------- Model T" is sufficient to admit evidence *aliunde* for the purpose of identification when the purchaser owned only one automobile, the abbreviation "S. H." meaning "second-hand," and "Model T," a certain type of Ford; and when registered and identified is superior to a later registered mortgage given by the purchaser to others. *Motor Co. v. Motor Co.*, 371.

SCHOOLS AND SCHOOL DISTRICTS.

B Enlarging Districts.

a Power of County Board of Education to Exercise Eminent Domain to Enlarge District

1. Construing C. S., 5469, in connection with the former statutes giving the county board of education the power to condemn lands neces-

SCHOOLS AND SCHOOL DISTRICTS B *a—Continued.*

sary for public school purposes within the limitation of ten acres, it is *Held*, the fact that one of these schools had already acquired a less amount of land did not preclude the county board of education from acquiring by another proceeding sufficient lands to meet the enlarged and necessary requirements of the school for additional lands within the limitation imposed by statute. *Board of Education v. Pegram*, 33.

2. Where the county board of education has the power to condemn land under former statutes the question of whether a later statute is declaratory of the existing law or whether it confers additional power upon the board becomes academic. *Ibid.*

SCOPE OF EMPLOYMENT see Master and Servant D b.

SEDUCTION—Testimony of physician as to virtue of prosecutrix see Evidence D e 1.

SHERIFFS.

B Compensation.

a Distinction Between Salary and Fee Basis

1. The payment by the county for the services of a tax collector upon a salary or wage basis differs from that of a fee or commission basis in that in the former the payment for such services depends upon a period of time of service in such capacity, and in the latter, upon the particular acts of collection or value of the services rendered. *Ferguson v. Martin*, 301.

C Powers, Duties and Liabilities.

d Duty to Turn Over Tax Books Upon Expiration of Term of Office

1. Where an act which says in its caption that its purpose is to regulate salaries, etc., repeals all former laws, and provides that the sheriff of a certain county should receive for his services as sheriff the fees of his office, and for his services as tax collector he should receive a certain sum per annum, payable monthly: *Held*, in the collection of taxes the sheriff was on a salary basis, and under the provisions of chapter 213, section 7, Public Laws 1927, he is required to turn over to his successor the tax books upon the termination of his term of office, and mandamus will lie to compel him to do so. *Ferguson v. Martin*, 301.

D Liability for Public Funds (Liability of surety on bonds see Principal and Surety B c).

a Nature and Extent of Liability in General

1. The liability of a sheriff for moneys he has collected for the county is that of insurer, the moneys so collected being regarded as held by the sheriff in trust for the county, and his liability for such funds can be discharged only by payment to the county under the provisions of the statute. *Indemnity Co. v. Corp. Com.*, 562.

STATE—Exercise of eminent domain see Eminent Domain B a—Highway Commission see Highways A—Industrial Commission see Master and Servant B—Park Commission see Eminent Domain B a.

STATUTE OF FRAUDS see Frauds, Statute of.

STATUTES (Authorizing bonds see Taxation A a—Creating drainage districts see Drainage Districts A a—Table of statutes construed see Consolidated Statutes).

A Enactment, Constitutionality and Validity.

a Constitutional Requirements in Enactment (creating drainage district see Drainage Districts B a 2)

1. The provisions of the act creating the North Carolina Park Commission are constitutional and valid. Chapter 48, Public Laws of 1927. *S. v. Lumber Co.*, 4.

c Constitutionality and Validity of Retroactive, Curative and Ex Post Facto Statutes (Statute changing procedure only see Banks and Banking H a 7)

1. An *ex post facto* statute prohibited by the State Constitution, Art. I, sec. 32, relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by C. S., 996, is not objectionable as falling within the Constitutional inhibition. *Stanback v. Bank*, 292.

2. A statute passed to preserve the credit of a certain county in enabling it to meet the payment of its bonds when due, authorizing the issuance of refunding bonds and ratifying the act of the county commissioners in borrowing from the general county fund pending the authorization and issuance of the refunding bonds, is not objectionable as a retroactive statute under the facts of this case. *Barbour v. Wake County*, 314.

3. A retrospective act to cure an irregular or defective statute and to ratify proceedings thereunder, which the Legislature originally had the authority to enact, and which does not impair the obligations of a contract or affect vested rights is valid and constitutional. *Greene County v. R. R.*, 419.

d Vague or Contradictory Statutes

1. C. S., 4103, limiting the effect of a conveyance by the husband of the "home site" without the voluntary signature and assent of his wife signified by her private examination according to law, is valid, and does not fall within the principle that a statute too vaguely worded to express a definite meaning, and which is not susceptible of interpretation by the courts, will be declared void. *Boyd v. Brooks*, 644.

e Special Acts in Regard to Charters of Corporations

1. The provisions of Article VIII, section 1, of our State Constitution, prohibiting the Legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the Legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those

STATUTES A *e—Continued.*

within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined. *Holmes v. Fayetteville*, 746.

B Construction and Operation.

a General Rules for Construction of Statutes

1. A statute will be interpreted in accordance with the meaning and intent of the Legislature as gathered from its terms, and where a technical interpretation will destroy the manifest spirit, the latter will prevail. *Machinery Co. v. Sellers*, 30.

2. Where the meaning of a statute is at all in doubt, reference may be had to the title and context as legislative declarations of its purpose. *Ibid.*

C Repeal and Revival.

b Repeal by Implication

1. Repeals of statutes by implication or construction are not favored by the courts, and for a later statute to repeal a former one the repugnancy between them must be clear, and then the repeal will operate only to the extent of the repugnancy. *Lumber Co. v. Welch*, 249.

SUBMISSION OF CONTROVERSY see Controversy Without Action.

SUBROGATION see Principal and Surety B c 2, Insurance O b, Bills and Notes I d 1.

SURETIES see Principal and Surety.

TAXATION (Drainage assessments see Drainage Districts B—Assessments for public improvements see Municipal Corporations G c).

A Constitutional Requirements and Restrictions.

a Necessity of Submission of Question of Issuance of Bonds to Voters

1. Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of the State Constitution, Art. VII, sec. 7, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county. *Barbour v. Wake County*, 314.

2. Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the Legislature: *Held*, the bonds later authorized by the Legislature and issued by the county to refund the indebtedness to the general county fund are for a special pur-

TAXATION A *a—Continued.*

pose and do not fall within the general limitation of fifteen cents on the one hundred dollars valuation prescribed by the Constitution, Art. V, sec. 6. *Ibid.*

3. The board of county commissioners, having the supervision and control of roads, bridges, and the levying of taxes and the finances of the county, Constitution, Art. VII, sec. 2, have the authority by proper resolution to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan under a valid statute providing therefor and declaring itself to be a special statute validating and legalizing the transaction. *Ibid.*

4. Township bonds issued for aiding the construction and operation of a railroad therein are not for a necessary expense, and require the approval of the voters of the township under a valid statute authorizing the issuance of the bonds. *Greene County v. R. R.*, 421.

5. Where a deficit has accumulated in the running expenses of a public school of a township, and the voters of the township under a valid statute have approved its payment by the township, it is not necessary that the question of the issuance of bonds, authorized by a later statute for paying the indebtedness, be submitted to the voters of the township in order to validate the bonds so issued, the later statute merely prescribing the method by which the former authority should be executed. *Wolfe v. Mt. Airy*, 450.

6. Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of our State Constitution, Art. VII, sec. 7, nor is it in violation of the Fourteenth Amendment to the Federal Constitution. *Holmes v. Fayetteville*, 740.

c Uniform Rule and Ad Valorem

1. Township bonds to aid in the construction of a railroad, issued in accordance with a valid statute, are not objectionable on the grounds that taxes levied against such railroad are to be expended in paying the interest coupons of the bonds and in maintaining the sinking fund provided for in the act, the provision of the Constitution requiring uniformity in the levy of taxation not applying to the distribution of the revenue derived therefrom. *Greene County v. R. R.*, 419.

d Classification for Taxation

1. The statute classifying trucks, etc., hauling freight for hire for license taxes in accordance with the distance of route along the State's highway is held to be upon a reasonable and substantial basis, and there being no constitutional inhibition against such classification, it is held not to be discriminatory contrary to the provisions of our State Constitution, Art. V, sec. 3, or section 1, Fourteenth Amendment of the Constitution of the United States. *Clark v. Maxwell*, 604.

TAXATION A—*Continued.*

f Form and Requisites of Statutes Authorizing Bond Issue

1. Where a statute authorizing a township to issue bonds to aid in the construction of a railroad therein omits to specify the amount of the issuance, and the commissioners have called an election upon a petition therefor to vote thereon in an amount not to exceed $100,000, and this election is carried and the bonds are issued in that sum and held in escrow, and later a curative statute is enacted likewise fixing the amount of the issue in that sum: *Held,* the bonds are not invalid by reason of the omission in the original act. *Greene County v. R. R.*, 419.

g Form and Requisites of Bonds Issued Under Valid Authority

1. Where an act authorizing the issuance of township bonds provide that they shall be in the sum of $100 each, and a curative act is passed providing that the signature of the chairman and the clerk of the board of county commissioners "shall be conclusive of said form and details" the denomination of the bonds, nothing else appearing, is to be regarded as a detail, and the bonds are not affected by the fact that they were issued in larger denominations. *Greene County v. R. R.*, 419.

B Liability of Persons and Property (Assessments for public improvements see Municipal Corporations G).

a Solvent Credits

1. Where the grantors in a timber deed retain title as security for the payment of the purchase price, and the deed provides for payment as the timber is cut and removed and for the execution of notes for the deferred payments which were to be unaffected by failure to cut and remove the timber: *Held,* the notes thus given, being unconditional promises to pay money are solvent credits and subject to taxation under the provisions of chapter 102, Public Laws 1925, chapter 71, Public Laws 1927, providing for the taxation of solvent credits under the authority of our State Constitution, Art. V, sec. 3. *Alston v. Warren County*, 470.

TENANT see Landlord and Tenant.

TORRENS ACT see Deeds and Conveyances G.

TORTS—Negligence see Negligence—Negligence of master see Master and Servant C—Of railroads see Railroads D—On highway see Highways B—Torts of municipal corporations see Municipal Corporations E—Particular torts see Fraud, Trespass, and Particular Titles of Torts).

TRESPASS.

A Acts Constituting Trespass and Liability Therefor.

b Abuse of License

1. The permission of a carrier by rail to its patrons to store cotton on its platform confers upon them the right to remove the cotton, but does not extend to the right to permit a competitive carrier to do so for the purpose of transporting the cotton over its own line, and the competitor's acts in so doing is trespass *ab initio.* *R. R. v. Transit Co.*, 505.

TRESPASS A—*Continued.*

c Obstructing or Preventing Use of Property Rights or Public Ways

1. Where an alley has been dedicated to the public and accepted by it, an allegation of the complaint in an action against an abutting owner that he has closed the alley with an obstruction and fastened the end on to the plaintiff's abutting property on the other side is one to the effect that the defendant has trespassed upon the property rights of the plaintiff and is sufficient to allege a good cause of action. *Bowie v. Tucker*, 671.

TRESPASSERS AND LICENSEES see Electricity A b.

TRIAL (Right to trial by jury see Jury C, Criminal Law I a—Trial in criminal cases see Criminal Law I—Trial in particular forms of action see Particular Heads).

B Reception of Evidence (Harmless error in reception of evidence see Appeal and Error J e 3, 4, 5).

c Objections and Exceptions

1. Where the master is sued for damages for a negligent injury inflicted on his servant by reason of defective tools or appliances furnished the latter to do his work, an exception must be duly taken to an incompetent question calling forth admission of the master's vice-principal, and when taken only to the answer of the witness on motion to strike out, the exception will not ordinarily be considered on appeal when the answer is responsive to the question. *Bryant v. Construction Co.*, 639.

D Taking Case or Question from Jury.

a Nonsuit (In negligent actions see Negligence D c—Sufficiency of evidence see Particular Causes of Action)

1. Where the only evidence in an action upon an accident insurance policy tends to show that the defendant was not responsible under the terms of the policy, the defendant's motion as of nonsuit is properly granted. *Gant v. Ins. Co.*, 122.

E Instructions (In criminal cases see Criminal Law I g—In caveat proceedings see Wills D i).

c Form, Requisites, and Sufficiency of Instructions

1. In an action to recover damages of a bus line where there is sufficient evidence tending to show that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit; and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of C. S., 564, requiring that the court instruct the jury on the law arising from all substantial features of the case, and constitutes reversible error. *Williams v. Coach Co.*, 12.

TRIAL E *c—Continued.*

2. Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff, under the provisions of C. S., 564, requiring him to charge upon the principles of law arising from the evidence in the case. *Lipscomb v. Cox*, 64.

3. Where the issues of negligence, contributory negligence, assumption of risk, and damages are submitted to the jury, it is required that a trial court charge the jury as to the effect of a finding of negligence and contributory negligence on the issues of damages, and his failure to do so is reversible error. The correct form of these issues is given. *Oates v. Herrin*, 171.

4. Where the trial court gives conflicting instructions upon a material phase of the case it cannot be assumed that the jury followed the correct part of the charge in answering the issue, and a new trial will be awarded on appeal. *Coe v. Loan Co.*, 689.

d Applicability to Pleadings and Evidence

1. Where, in an action in claim and delivery involving the title to an automobile, there is evidence tending to show that the plaintiff bought the car for himself and *per contra* that he made a gift of the car to the two daughters by delivering the car with intent to pass title either to their father for them or to them direct, an instruction that limits the defense to the evidence to the effect of an immediate delivery by the father to his daughters and deprives the defendant of their defense upon the second phase thereof of the gift direct to the daughters is reversible error. *Harrell v. Tripp*, 426.

e Requests for Instructions

1. Where there is error in the charge upon a substantial feature of the case the appellant is entitled to a new trial upon error assigned without having made a special prayer for instructions in regard thereto. *Oates v. Herrin*, 171.

2. In an action to recover damages for injury alleged to have been negligently caused by a collision between plaintiff's car and the defendant's truck on a public highway, an instruction requested by the defendant is properly refused when not based upon evidence in the case, but on an inference that had the plaintiff blown his horn it would have aroused the defendant's driver of the truck from his inattention in time to have avoided the injury in suit. *Kjellander v. Baking Co.*, 206.

g Construction and General Rules Upon Review

1. Hypothetical illustrations explaining the law arising upon the evidence in a case will not be held for reversible error in the absence of potential prejudice to the complaining party. *Dulin v. Dulin*, 215.

h Additional Instructions and Order for Jury to Again Retire

1. The trial court has the power, if he is under the impression, created by inconsistent answers to separate issues, that the jury had not understood his charge, to give additional instructions and have the jury again retire for further consideration. *Oates v. Herrin*, 171.

TRIAL—*Continued.*

F Issues (In caveat proceedings see Wills D j).

a Form and Sufficiency in General

1. Where the issues submitted to the jury fully present all phases of the controversy and fully determine the rights of the parties, they are sufficient, and the court's refusal to submit other issues tendered will not be held for reversible error. *Bank v. Bank,* 526; *Ayden v. Lancaster,* 556.

G Verdict (In prosecution for receiving stolen goods see Receiving Stolen Goods—In particular actions see Particular Titles).

b Form and Validity of Answers to Issues

1. A verdict in an action against a corporation and individually against its president that the defendant corporation was answerable in damages for breach of plaintiff's contract of employment and that the plaintiff's mortgage for moneys loaned by the individual defendant was subject to be foreclosed is not objectionable as inconsistent. *Connor v. Mfg. Co.,* 66.

TRUSTS.

D Revocation of Trusts.

a Voluntary Trusts of Personalty

1. A trust estate in personalty created by the donor in consideration of one dollar and natural love and affection is a voluntary trust and may be revoked by the donor of the trust under the provisions of C. S., 996, as amended. *Stanback v. Bank,* 292.

2. Where a voluntary trust is created in the stock of a bank for the life of the donor or until he reach the age of fifty years, and at the termination to his issue or in the absence of issue to his next of kin under the statute of distributions, those who take in remainder take upon a contingency, the vesting of which depends upon the uncertain happening of a future event, and the trust may be revoked by the donor under the provisions of C. S., 996. *Ibid.*

USURY (As grounds to enjoin foreclosure see Mortgages H b).

C Pleading, Evidence and Trial.

a Pleading

1. Usury must be pleaded and the question may not be raised by demurrer. *Berger v. Stevens,* 234.

VENDOR AND PURCHASER.

B Construction and Operation of Contracts for Sale of Realty.

a Time

1. An option good "until" a day specified includes that day. *Wimbish v. Hattaway,* 107.

VENUE—Removal for convenience of witnesses within discretionary power see Appeal and Error J b 1.

VERDICT see Trial.

"WANTON" INJURY see Execution K a 3.

WAREHOUSEMEN.

A Rights and Remedies of Warehousemen.

a Liens

1. Under the provisions of C. S., 2459, construed in *pari materia* with sections 8107, 2459, 2460, 4925(a), *et seq.*, 5118, the persons, firms or corporations entitled to the possession and lien on property stored in warehouses applies to such as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant. *Machinery Co. v. Sellers*, 30.

WARRANTIES see Sales F, H e—In deeds see Deeds and Conveyances.

WATER AND WATERCOURSES.

C Surface Waters, Dams and Ponds.

a Mutual Rights and Duties of Proprietors

1. The upper proprietor of adjoining lands has the right to accelerate the flow of water upon his own lands without changing the course upon the lands of the lower proprietor without liability for damage to the land of the lower proprietor. *Sykes v. Sykes*, 37.

2. Where the evidence is conflicting as to whether a ditch was on the land of an upper proprietor or on a public roadway the question is for the jury under proper instructions from the court, and upon their finding that the roadway was private the upper proprietor is not liable for damages caused to the land of the lower proprietor by filling the ditch and accelerating the flow of surface water. *Ibid.*

"WILFUL" INJURY see Execution K a 3.

WILLS (Administration and Execution see Executors and Administrators—Descent see Descent and Distribution).

C Requisites and Validity.

d Holographic Wills

1. In order to establish a valid holographic will it is not necessary that the papers among which it is found after the death of the testator be the most valuable of his papers, and it is sufficient if he regarded them as papers of value, and worthy of preservation. *Dulin v. Dulin*, 215.

2. Evidence that a paper-writing was in the handwriting of the deceased, signed by her, and found among her valuable papers is sufficient to be submitted to the jury on the issue of *devisavit vel non*, and *held further*, under the facts of this case the paper-writing, being found in a box in which she kept papers of value, evidently regarded as valuable by her, and evidencing her intent that the paper-writing operate as her will, was found among her valuable papers within the meaning of C. S., 4144, and evidence that her husband also kept certain valuable papers of his own in the same box does not vary the result. *In re Will of Shemwell*, 332.

WILLS—*Continued.*

D Probate and Caveat of Wills.

b Caveat Proceedings in General

1. In a suit by the executor to interpret the will of the testator wherein the issue of *devisavit vel non* has been raised, the court, with the consent of all the parties interested may treat the case as having arisen upon the issue ordinarily raised upon the caveat to the will probated in common form, and construe the instrument upon an affirmative finding upon that issue. *Dulin v. Dulin*, 215.

h Evidence and Burden of Proof in Caveat Proceedings

1. Upon the trial of the issues of *devisavit vel non* it is competent for the disinherited child of the testator to testify as to her financial condition, the fact of disinheritance, and affectionate relationship between her and the testator upon the question of the mental capacity of the testator. *In re Will of Casey*, 347.

2. Upon the trial of a caveat to a will where it is contended that one of the several sheets of the writing had been substituted for the original, the caveators must show a fraudulent substitution, and they cannot prevail in this contention when there is no evidence thereof; and where it appears on appeal that the jury has accepted the evidence to the contrary under correct instructions, the judgment of the lower court sustaining the paper-writing as the will will be sustained. *In re Will of Brockwell*, 545.

i Instructions in Caveat Proceedings

1. An instruction that the caveators must prove that "every part" of the paper-writing be in the handwriting of the deceased includes the signature and is sufficient and correct. *Dulin v. Dulin*, 215.

2. Where the judge in his charge upon a caveat to a will uses the word "will" in referring to the paper-writing being propounded, it will not be held as an expression of the court upon the weight and credibility of the evidence contrary to the requirements of the statute when it appears from the context of the instruction that he was only referring to the writing itself, and must have been so understood by the jury. *Ibid.*

j Form and Sufficiency of Issue of Devisavit Vel Non

1. The form of an issue submitted to the jury upon the caveat to a will "is the paper-writing and every part thereof offered in evidence the last will and testament of the deceased" is sufficient to present every phase of the case to the jury under proper instructions from the court, and when the writing is sought to be established as a holographic will, it is not error for the court to refuse to submit an issue with further inquiry as to its having been found among the testator's valuable papers, or other evidentiary matters arising in the inquiry under the issue submitted. *Dulin v. Dulin*, 215.

E Construction and Operation of Wills.

a General Rules of Construction

1. A will and codicils thereto will be considered together as one instrument and construed in their entirety to effectuate the intent of the testator as gathered from the language used. *Tate v. Amos*, 161.

WILLS E *a—Continued.*

2. A will will be construed so as to avoid intestacy when this can be reasonably done, and the word "or" will not be construed as "and" when the latter word would defeat the testator's intent under a proper interpretation of the instrument. *Ibid.*

3. In construing a will effect will be given to the intention of the testator as gathered from the written instrument unless in contravention of some rule of law, and wherever possible effect will be given to every clause and every word, and a devise of real property will be construed as a devise in fee simple unless the will or some part of it shows an intent to convey an estate of less dignity, C. S., 4162. *West v. Murphy*, 488; *Brown v. Lewis*, 704.

4. In construing a will there is a presumption against intestacy. *Ibid.*

5. By will an estate may pass by mere implication from the language used, without any express words to direct its course, but the implication must be necessary, or highly probable, and not merely possible. *Ibid.*

6. In the absence of a general residuary clause in a will, realty owned by the testator at his death and not devised in the will descends to his heirs at law as in case of intestacy. *Cheek v. Gregory*, 761.

b Estates and Interests Created

1. In a devise of a certain city lot to a designated beneficiary "or to her children," the devisee having a child, to whom a devise is made under a different item of the will, the word "or" will not be construed to mean "and" when the latter interpretation would defeat the intent of the testator or have the legal effect of rendering the devise void, but will be construed to vest the fee-simple title in the mother should she survive the testator, otherwise to her child or children. *Tate v. Amos*, 161.

2. A bequest to the wife by her husband of all his personal property during her life, to dispose of as she may see fit, and such not disposed of to be sold after her death, with limitation over to his and her heirs, does not give the wife the power to dispose of any of the property by will. *Jones v. Fulbright*, 274.

3. Where a certificate of deposit issued by a bank in effect creates an agency in the wife to withdraw the money during her husband's lifetime, it cannot be held that the provisions in the husband's will bequeathing his personalty to her for life to dispose of as she pleased during her life, with limitation over, enlarges the wife's life estate or gives her the power of disposition by will. *Ibid.*

4. Where the owner of the fee devises his land to his granddaughter so long as she should live, and if no children, then to her brother by name, the granddaughter being but a child at the date of the will: *Held*, upon the granddaughter dying leaving her surviving a child, the child takes a remainder in the lands by implication as purchaser under the will, the granddaughter having but a life estate, and her brother taking no interest in the land, the contingency upon which his estate was to be divested having happened. *West v. Murphy*, 488.

WILLS E *b—Continued.*

5. Where two items of a will are apparently in conflict, one a devise to the testator's wife of the residue and remainder of the estate "all her heirs, executors, administrators and assigns," and the preceding item, "I want whatever part of my estate is left at the death of my wife, and after the younger children have been educated, equally divided among my living children at that time": *Held,* the wife takes an absolute fee-simple title to the lands thus devised, she being regarded as the primary object of the testator's bounty, and a devise being construed to be in fee simple unless a contrary intention is shown by the will or some part thereof. C. S., 4162. *Brown v. Lewis,* 704.

6. Under a devise of the remainder of the testator's estate to his wife and "all" heirs: *Held,* the word "all" may be construed "and," giving the estate to her "and her heirs," or a devise in fee simple; and construed in connection with another item of the will, "I want whatever part of my estate that is left at the death of my wife to be divided among my living children," the word "want," so used, is a precatory word not affecting the quality of the estate devised to the wife, and does not create a trust. *Ibid.*

7. Where a testator in disposing of his property by will devises certain of his lands to his widow for life and by various other items certain other lands to his mother, brother and sisters, and then by a subsequent item "after the foregoing I want my personal property and all my moneys on hand" equally divided between his wife and son, followed by another item "if there is over ten thousand dollars each for him and his mother besides real estate and property named, the balance I wish to go to my brother and sisters and their children": *Held,* the word "balance" thus used refers only to the personal property, and there being no residuary clause after the life estate devised, the lands thus devised go to the son as the sole heir at law of the testator, as to this property the testator having died intestate. *Cheek v. Gregory,* 761.

f Designation of Devisees and Legatees and Their Respective Shares

1. Where the obvious language of a will manifests the intent of the testator that his nieces and nephews are to take as beneficiaries thereunder, his brothers and sisters are excluded by necessary implication. *Dulin v. Dulin,* 215.

2. Where according to the direction of a will the estate is to be equally divided between the nieces and the two nephews of the testator after deducting a certain amount of money from the shares of the nephews, the amount named is to be deducted from the sum of both of their shares, each share burdened with one-half the amount named, before equal distribution of the balance is to be made. *Ibid.*

3. A direction to an executor to educate certain beneficiaries under the will includes the support and maintenance of such beneficiaries, under the facts of this case, and the degree of education to be given them is within the discretion of the executor, and the executor has the authority to deduct within his reasonable discretion a certain

WILLS E *f—Continued.*

amount of money from the corpus of the estate for this purpose before making distribution among other beneficiaries as further directed by the will. *Ibid.*

i Actions to Construe Wills

1. An executor of a will may seek the advice of the court in the interpretation of the instrument and the disposition of the testator's estate within the intent and meaning of the language used therein, and where in the action a caveat has been filed, the court may construe the will upon an affirmative finding upon the issue of *devisavit vel non. Dulin v. Dulin*, 215.

WITNESSES—Privileged communications see Evidence D e—Testimony as to transactions with decedent see Evidence D b.

WRIT OF ASSISTANCE see Assistance, Writ of.